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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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WESTERN UNDERWRITING & MORTGAGE  
COMPANY, a Corporation,

Appellant,

vs.

THE VALLEY BANK OF PHOENIX, a Corpora-  
tion, and THE UNION BANK & TRUST  
COMPANY, a Corporation,

Appellees.

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Transcript of Record.

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Upon Appeal from the United States District Court for the District  
of Arizona.

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Filed

JAN 20 1916

F. D. Monckton,  
Clerk.

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Circuit Court of Appeals

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States, in and  
for the District of the State of Arizona.*

No. E. 20—In EQUITY.

WESTERN UNDERWRITING & MORTGAGE  
COMPANY, a Corporation Organized and  
Existing Under the Laws of the State of Cali-  
fornia,

Complainant,

vs.

THE VALLEY BANK OF PHOENIX, a Corpora-  
tion, and THE UNION BANK & TRUST  
COMPANY, a Corporation, Both Organized,  
Existing and Doing Business Under the Laws  
of the State of Arizona,

Defendants.

**Complaint.**

To the Judge of the District Court of the United  
States for the District of the State of Arizona:

Your orator, the Western Underwriting & Mort-  
gage Company, a corporation duly organized, incor-  
porated and existing under the laws of the State of  
California, and a citizen of said State, brings this, its  
bill of complaint on its behalf and on behalf of all  
other stockholders of the Union Bank and Trust  
Company, who may elect to intervene and join in this  
suit, and for the benefit and in behalf of all stockhold-  
ers of said corporation, against The Valley Bank of  
Phoenix, a corporation organized, existing and en-  
gaged in business under and by virtue of the laws of  
the State of Arizona, and The Union Bank & Trust



Company, a corporation likewise organized and existing and engaged in business under the laws of the State of Arizona, and thereupon your orator alleges:  
[1\*]

I.

That your orator, the Western Underwriting & Mortgage Company, is a corporation duly organized and existing under and by virtue of the laws of the State of California, and is a citizen and resident of said State, having its principal place of business at the city of San Diego, and by its charter duly authorized to purchase, own, hold and vote stock in other corporations.

II.

That defendants, The Valley Bank of Phoenix, and The Union Bank & Trust Company, are each corporations organized, existing and engaged in business under and by virtue of the laws of the State of Arizona; each of said corporations having its principal place of business in the city of Phoenix, State of Arizona.      ..

III.

That each of said corporations was organized for the purpose of transacting and engaging in a general banking business in the territory, now State of Arizona, including among the powers granted to each of said corporations under their articles of incorporation, the right, power and authority to engage in and deal in the purchase, sale and acquisition of real and personal property and choses in action, as well as to engage in the business of acquiring by purchase

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\*Page number appearing at foot of page of original certified Record.

or otherwise, shares of stock, choses in action and any possession or other evidence of value and assets owned by other corporations.

IV.

Your orator alleges that on the 27th day of January, A. D. 1912, on which date The Union Bank & Trust Company, one of the defendants above named, was engaged in business as authorized by its articles of incorporation, it became, as *your is* informed and believes, and upon such information and belief alleges the truth to be, financially embarrassed to such an extent as [2] rendered it unable promptly to meet its liabilities and for the purpose of relieving itself of its obligations promptly to pay off and discharge said liabilities, entered into a certain agreement with The Valley Bank of Phoenix, the other defendant hereinabove named, under and by the terms of which in consideration of The Valley Bank of Phoenix assuming and agreeing to pay all of the depositors in said The Union Bank & Trust Company, the amounts due them as the same should be demanded, and also to pay all the banks the amount due such banks as such should be demanded, and to pay all taxes due from whatever source assessed against or due from said The Union Bank & Trust Company as the same should be demanded and the payment of outstanding certificates of deposit or other evidences of indebtedness issued by said The Union Bank & Trust Company as the same should become due and payable, together with all outstanding cashiers' checks issued and outstanding by said The Union Bank & Trust Company, said The Union



Bank & Trust Company on said date did transfer, assign, deliver and set over unto the said The Valley Bank of Phoenix, absolutely and without condition, and as hereinabove set forth for the express purpose of facilitating the payment of any indebtedness arising through any of the above-mentioned causes, all of the cash on hand belonging to said The Union Bank & Trust Company, together with all negotiable paper payable to it and all the bonds belonging to it and all securities of other corporations belonging to or held by it, and all of its claims, demands, equities and interests whatsoever, then owned by said The Union Bank & Trust Company against any and all other persons, companies, corporations or copartnerships and against the property of all such other persons, companies, corporations or copartnerships; and the said The Valley Bank of Phoenix in consideration of said agreement and of said assignment and conveyance so by said The Union Bank & Trust Company made and executed, in compliance with the terms [3] of said agreement, which assignments so made and executed were as complainant alleges, delivered to and received by said The Valley Bank of Phoenix, did agree to and did assume the payment of all claims and demands legally due or payable by said The Union Bank & Trust Company to any and all persons, companies, corporations or copartnerships, having or claiming any demands therein described against said The Union Bank & Trust Company.

Said contract and agreement as hereinbove set forth impressed upon said The Valley Bank of Phoenix the duty and obligation of paying off and dis-

charging any and all said indebtedness due from or owing by said The Union Bank & Trust Company subject only to the condition as mentioned in said contract that in the event said The Valley Bank of Phoenix should suffer any loss under the terms of said agreement hereinabove mentioned, J. F. Cleaveland, John P. Orme, George H. N. Luhrs, and J. M. Swetnam therein in said contract signing as individuals and as individual guarantors should guarantee to said The Valley Bank of Phoenix, the payment to said bank of any such deficiency. It is further provided in said contract that said guarantors, upon the payment by them to said The Valley Bank of any deficiency which might remain, and any loss which might be incurred by said The Valley Bank, should be entitled to receive from The Valley Bank all unliquidated assets remaining in its hands. And your orator further alleges that under the terms of said contract the guarantors hereinabove named assume not only the individual responsibility of protecting said The Valley Bank against loss, but acquire, under the terms of said contract, the rights to any assets which might remain, to their use and for their individual benefit. And your orator alleges that said contract of guaranty so made and entered into by the said J. F. Cleaveland and the others of said guarantors hereinabove mentioned and named, was and is a personal contract of guaranty made in their individual capacities, and not for the benefit of said [4] The Union Bank & Trust Company or any of the stockholders thereof; and your orator further alleges that upon the execution of said contract



and agreement and the delivery to and acceptance by said The Valley Bank of Phoenix of the assignment of all of said securities so by said contract assigned and delivered to said The Valley Bank of Phoenix, said The Union Bank & Trust Company became and thereby was completely discharged from any and all liabilities theretofore existing for the payment by it of any and all payments or obligations due or to become due to any of its depositors, save and excepting only the liability of its directors to pay out of their personal funds by reason of their personal liability as directors, any deficiency which might exist in the payment to its depositors of the amount of their deposits; said guaranty so made by said persons was and is by the terms of said contract, a conditional guaranty only, determinable at the expiration of three (3) years from said 27th day of January, A. D. 1912, and your orator alleges upon information and belief that the assets so by said The Union Bank & Trust Company transferred to The Valley Bank of Phoenix as hereinabove set forth were of a fair, just and reasonable value of more than Four Hundred Thousand (\$400,000.00) Dollars and that said assets of such value were greatly in excess of the liabilities of The Union Bank & Trust Company on said 27th day of January, A. D. 1912, and could by said The Valley Bank of Phoenix be converted into cash in an amount largely in excess of any amount necessary to discharge and pay off the liabilities of The Union Bank & Trust Company on said date. Said contract, together with the schedule of debts and obligations before the execution of

said contract due from said The Union Bank & Trust Company and to be by said Bank performed, being annexed to this petition for reference and marked exhibit "A" and exhibit "A-1." [5]

Your orator further alleges that in the month of February, A. D. 1913, one J. K. Tennant, who at that time was the president of The Union Bank & Trust Company represented to complainant that the outstanding debts and obligations due and owing from The Union Bank & Trust Company had been liquidated by and under the terms of the contract with The Valley Bank of Phoenix hereinabove mentioned, and that said The Union Bank & Trust Company was a going corporation in a solvent condition and could with advantage to stockholders invest a large amount of money in safe and profitable investments and securities in the State of Arizona, and solicited from said complainant the transfer by it to The Union Bank & Trust Company of negotiable securities for the purpose of being handled and invested by The Union Bank & Trust Company in the State of Arizona, and further represented to complainant that in exchange for One Hundred Thousand (\$100,000.00) Dollars of mortgages and other first-class securities at said time owned and controlled by complainant, it would sell to complainant its eight (8%) per cent cumulative preferred stock to the extent of about Eighty-three Thousand (\$83,000.00) Dollars upon the basis of the then book value of said stock, which was represented to be of the value of one hundred and Seventy-four Dollars (\$174.00) per share, and in addition thereto, pay to complainant, the sum of



about Seventeen Thousand (\$17,000.00) Dollars in money as a consideration for the purchase by The Union Bank & Trust Company of said securities and mortgages.

On the 5th day of February, A. D. 1913, at an adjourned meeting of the stockholders of The Union Bank & Trust Company, held in the office of said company, a resolution was passed, reciting that the value of the assets of the portion of the business conducted by complainant relating to the handling and dealing in first mortgages upon real property was ascertained to be the sum of One Hundred Thousand (\$100,000.00) Dollars [6] and further reciting that it was the desire of said The Union Bank & Trust Company to purchase said mortgage business in said amount and to pay therefor, in money and in shares of preferred stock of The Union Bank & Trust Company, and the president and secretary of said The Union Bank & Trust Company were at said stockholders' meeting, directed and empowered to make such purchase of such assets and to pay therefor a sum not greater in the aggregate than the book value of the assets of said mortgage business of complainant in the following manner, to wit:

By the payment of the sum of Seventeen Thousand Six Hundred Thirty-six (\$17,636.00) in money and the balance of said One Hundred Thousand (\$100,000.00) Dollars in preferred stock of said The Union Bank & Trust Company, said preferred stock being entitled to share in a preferred dividend of eight (8%) per cent annually and such dividends and interest to be cumulative at the price to be ascer-

tained and upon the basis of the then present book value of said stock and to issue thereafter sufficient shares of said stock, which issue in addition to the amount of money above specified should equal in value the ascertained value of the assets of the mortgage portion of the business of the Western Underwriting & Mortgage Company so to be purchased.

And thereafter on the 26th day of March, A. D. 1913, pursuant to the requirements of said resolution, said The Union Bank & Trust Company did issue in the name of complainant Four Hundred Seventy-two (472) shares of the preferred stock hereinabove mentioned and paid to complainant the sum of Seventeen Thousand Six Hundred Thirty-six (\$17,636.00) Dollars in money, thereupon complainant, by proper endorsements and assignments, transferred, set over and assigned unto said The Union Bank & Trust Company, first mortgage notes and mortgages and delivered said assignments to said The Union Bank & Trust [7] Company, out of a total number of two thousand (2,000) shares of such preferred stock now outstanding, all of which complainant alleges is shown by the stock transfer books of said The Union Bank & Trust Company. A schedule of the assets delivered by complainant to The Union Bank & Trust Company in exchange for said shares of stock and money paid is hereto attached, annexed for reference and marked exhibit "B."

## VI.

In the month of May, A. D. 1913, and subsequent to the delivery by complainant to The Union Bank & Trust Company and the acquisition by it of the



shares of preferred stock as hereinabove mentioned and while the contract hereinabove referred to as the contract of January 27th, 1912, was in full force and effect and had been by the parties thereto neither abrogated or modified and while as your orator alleges defendant, The Valley Bank of Phoenix was collecting the assets assigned to it under the terms of said contract and using said collections for its own purposes and on its own account under the terms of said contract, and at a time when under the terms of said contract there could have existed no liability on the part of The Union Bank & Trust Company to said The Valley Bank of Phoenix, and at a time when there could have been no contingent liability on the part of the individuals made parties to said contract as guarantors of the collections to be made by The Valley Bank of Phoenix, the board of directors of said The Union Bank & Trust Company as complainant alleges, did, without any moving and just or legal consideration whatsoever, authorize the execution and delivery by said The Union Bank and Trust Company to The Valley Bank of Phoenix of its certain promissory note in the sum of One Hundred Sixty-four Thousand Four Hundred Thirty-two and 46/100 Dollars (\$164,432.46) which said promissory note, as your orator is informed and believes, was delivered to said The Valley Bank of Phoenix and as your orator is [8] informed and believes is now held by said The Valley Bank of Phoenix under claim by it made that it is an evidence of the indebtedness of said The Union Bank & Trust Company to said The Valley Bank of Phoe-

nix of One Hundred Sixty-four Thousand Four Hundred Thirty-two and 46/100 Dollars (\$164,532.46) with accrued interest; and your orator alleges that said transaction so authorized and entered into by the board of directors of The Union Bank and Trust Company was and is wholly void for the reason that the board of directors were unauthorized to execute the said note; that the meeting of said board was neither called nor held in conformity with the by-laws of said The Union Bank & Trust Company; that said note was given wholly without any consideration passing from The Valley Bank of Phoenix to The Union Bank & Trust Company and that said promissory note, if delivered for any purpose was delivered and is held by The Valley Bank of Phoenix as additional security for the performance by the individuals named in said contract of January 27th, A. D. 1912, as guarantors in their individual capacity against loss by the Valley Bank of Phoenix on account of collection to be by it made on its own account under the terms of said contract. That said promissory note is without consideration for the further reason that under the terms of said contract of January 27th, A. D. 1912, there could exist no liability on the part of The Union Bank & Trust Company or on the part of the individuals acting thereunder as guarantors until such liability, of any there existed, should be ascertained at the expiration of three (3) years from the date of said contract, and your orator alleges that in the execution and delivery by said board of directors of said promissory note, said board of directors acted fraud-



ulently and without authority and in a manner so as to greatly injure your orator and other stockholders similarly situated, as stockholders of said The Union Bank & Trust Company and greatly depreciate the value [9] of the stock so by it owned to the extent of four hundred seventy-two (472) shares of preferred stock as hereinabove set forth, and such stock has thereby become and now is greatly depreciated in value.

## VII.

Your orator further alleges that on December 30th, 1913, and at all times prior thereto since the 27th day of January, A. D. 1912, the contract hereinabove in this bill of complaint mentioned and set forth, between The Union Bank & Trust Company and The Valley Bank of Phoenix, was in full force and effect, and had not been changed or modified as to its terms, but notwithstanding, as your orator alleges, that said contract by its terms imposed upon The Valley Bank of Phoenix the duty, obligation and liability of discharging and paying off all indebtedness and obligations up to said 27th day of January, A. D., 1912, incurred by or due from The Union Bank & Trust Company, and notwithstanding the fact as herein alleged that in addition to said contract said The Union Bank & Trust Company attempting to act in the premises, did without further, other or additional consideration than that mentioned in said contract of January 27th, A. D. 1912, execute and deliver to said The Valley Bank of Phoenix its note for One Hundred Sixty-four Thousand Four Hundred Thirty-two and 46/100 Dollars (\$164,-

432.46) as hereinabove set forth; and notwithstanding the fact that on the 26th day of March, A. D. 1913, your orator, upon the representations so by the officers of said The Union Bank & Trust Company made as hereinabove set forth, delivered by proper endorsement and assignment to The Union Bank & Trust Company One Hundred Thousand (\$100,000.00) Dollars of first-class negotiable securities as hereinabove in this bill of complaint set forth; and notwithstanding as your orator alleges upon information and belief that said assets so by said The Union Bank & Trust Company purchased from your orator at the times and for the consideration [10] hereinabove mentioned, constituted practically all of the assets owned by said The Union Bank & Trust Company on the 30th day of December, A. D. 1913, said board of directors of The Union Bank & Trust Company at a meeting of said board purported to have been called for this purpose by resolution of the board of directors and not of the stockholders of said The Union Bank & Trust Company, entered into a certain contract with defendant, The Valley Bank of Phoenix, under and by the terms of which and purporting to act in behalf of The Union Bank & Trust Company, the directors thereof again transferred, assigned and set over unto said The Valley Bank of Phoenix each, all and every of the entire property and assets then owned by said The Union Bank & Trust Company included in which assignment were all of such portions as then remained in the hands of The Union Bank & Trust Company of the assets by said The Union Bank & Trust Company



acquired by purchase from your orator. It is recited in said resolution so authorizing the transfer of said assets as hereinabove mentioned that because on the 27th day of January, A. D. 1912, The Union Bank & Trust Company entered into a contract and agreement whereby said The Union Bank & Trust Company transferred to the Valley Bank of Phoenix certain assets in consideration of the payment by said The Valley Bank of Phoenix of all depositors in said The Union Bank & Trust Company, and the other indebtedness of said The Union Bank & Trust Company, in which contract the said J. F. Cleaveland, John P. Orme, George H. N. Luhrs and J. M. Swetnam, who are referred to and mentioned as guarantors and under the terms of which contract said guarantors agreed, at the end of three (3) years from the date of said contract, to pay to said The Valley Bank of Phoenix such sums of money as said The Valley Bank of Phoenix should have expended on behalf of The Union Bank & Trust Company, and that because said The Valley Bank of Phoenix on said 30th day of December, A. D. 1912, in addition to said assets held [11] the note of said The Union Bank & Trust Company for One Hundred Sixty-four Thousand Four Hundred Thirty-two and 46/100 Dollars (\$164,432.46), which note falls due January 27th, A. D. 1915, and not before said date, and which note it is further recited in said resolution so given by said The Union Bank & Trust Company in liquidation of its indebtedness to said The Valley Bank of Phoenix under said contract, that there remains unpaid upon said indebtedness, (which indebtedness

your orator alleges did not exist under the terms of said contract or if it did exist, was not due or payable until January 27th, A. D. 1915), the sum of Seventy-five Thousand (\$75,000.00) Dollars. And it is further recited in said resolution that said The Union Bank & Trust Company was willing to transfer and assign all of said assets to said The Valley Bank of Phoenix in consideration that The Valley Bank of Phoenix should release it from further claim or liability to it under the aforesaid contract of January 27th, A. D. 1912.

And your orator alleges the terms of said contract of January 27th, 1912, there existed no indebtedness due from said The Union Bank & Trust Company or owing to said The Valley Bank of Phoenix and they said transfer of assets by the board of directors of said The Union Bank & Trust Company to said The Valley Bank of Phoenix so by said board of directors made on the 30th day of December, A. D. 1913, was and is void for the following reasons, to wit:

That by the terms of said resolution an attempted transfer of all of the assets of said The Union Bank & Trust Company was made by said board of directors thereof, without action or authority given by the unanimous consent of the stockholders thereof, or by the consent of any stockholders had or obtained at a stockholders' meeting.

That said transfer was void for want of consideration moving from The Valley Bank of Phoenix to The Union Bank & [12] Trust Company in this, to wit: That at the time of said transfer of assets,



The Union Bank & Trust Company was not indebted to The Valley Bank of Phoenix in any sum whatsoever, which fact your orator alleges was then and there well known to the officers and directors of The Union Bank & Trust Company and of The Valley Bank of Phoenix, defendants herein.

That said assignment of assets so made was by the then directors of The Union Bank & Trust Company for the sole purpose of relieving the said J. F. Cleaveland, John P. Orme, George H. N. Luhrs and J. M. Swetnam of a possible and undetermined contingent liability as guarantors under the contract of January 27th, A. D. 1912, which liability, if any, there might have existed, was undetermined and under the terms of said contract could not be determined before January 27th, A. D. 1915. A copy of said contract and agreement dated December 30th, A. D. 1913, together with exhibits and schedules of assets and property so under the terms of said contract assigned to said The Valley Bank of Phoenix as hereinabove set forth, is hereto attached, marked for reference, "exhibit 1" and the schedules attached to said "exhibit 1" are for designation and reference, marked respectively "exhibits 2, 3, 4, 5, 6, 7, 8, 9, and 10."

#### VIII.

Your orator alleges that by the terms of the articles of incorporation of The Union Bank & Trust Company, and amendments thereof, and the by-laws adopted by said company, the owners of preferred shares of stock are not entitled to vote at stockholders' meetings and have no voice in the control or man-

agement of the affairs of said company, nor in the election of directors or officers thereof; that as a result of the unauthorized, fraudulent and void actions taken and attempted to be taken by the voting stockholders being the owners of shares of common stock of The Union Bank & Trust Company and the directors thereof, the stock of your orator, to the extent of four [13] hundred seventy-two (472) shares of the preferred stock of said company has been rendered valueless and said The Union Bank & Trust Company by its refusal to enforce the replacement in its treasury of all of the assets so by it transferred and by its refusal to demand and enforce the return by said The Valley Bank of said promissory note for One Hundred Sixty-four Thousand Four Hundred Thirty-two and 46/100 Dollars (\$164,432.46) hereinabove mentioned, which refusal on the part of said board of directors is hereinafter in this bill of complaint more particularly mentioned and described, have deprived your orator and other stockholders similarly situated of all and every asset and thing of value out of which your orator and other stockholders similarly situated may hope or expect to be paid their earnings of eight (8%) per cent per annum upon the preferred stock so held by your orator and such other stockholders, and of all and every asset whatsoever, upon the earnings and investment of which, said preferred stock so sold and issued to your orator and other stockholders similarly situated depends for its value and earning power, and that the stock now owned by your orator and other stockholders similarly situated, is as hereinabove alleged



and for the reasons hereinabove set forth of no value whatsoever.

### IX.

Your orator alleges that prior to the commencement of this suit between the hours of ten o'clock A. M. and five o'clock P. M. on the 28th day of February, A. D. 1914, *it* made a written demand upon the representative of said The Union Bank & Trust Company to commence appropriate proceedings against The Valley Bank of Phoenix for the purpose of securing the cancellation and return of said note for One Hundred Sixty-four Thousand Four Hundred Thirty-two and 46/100 Dollars (\$164,432.46) so held by said The Valley Bank of Phoenix, and also for the purpose of securing a reassignment and replacement by The Valley [14] Bank of Phoenix of all of the assets so as your orator alleges fraudulently and unlawfully conveyed to said The Valley Bank of Phoenix by The Union Bank & Trust Company on the 30th day of December, A. D. 1913, but that said board of directors, notwithstanding said demand so made, has refused and still does refuse to commence said suit or to take any steps whatsoever to recover said assets or cause a cancellation of said note, and your orator further alleges that it would be useless to endeavor to call a stockholders' meeting for the purpose of instructing said board of directors to commence said suit for the reason that it is advised by the lawfully constituted representative of one W. L. Rosa, the owner of a majority of the voting common stock of said The Union Bank & Trust Company, that at said meeting of

stockholders if so called for such purpose, he would cause to be voted his majority stock so by him owned against the passage of a resolution instructing said board of directors and officers of said The Bank & Trust Company to commence such suit.

PROPOSED AMENDMENT TO BILL OF COMPLAINT TO BE INSERTED AFTER LINE 19, Page 15, following the words "to commence such suit," being the closing of paragraph 9 of the Bill of Complaint herein.

"Your orator further alleges that W. L. Rosa, hereinabove mentioned, was the owner of the majority of the common stock entitled to be voted at a stockholders' meeting of the Union Bank & Trust Company prior to the bringing of this action on March 5th, 1914, for that notwithstanding the fact that prior to the bringing of this action, there appeared upon the stock transfer books of The Union Bank & Trust Company a record purporting to fix the ownership of 251 shares of the common stock of said Union Bank & Trust Company in the Western Underwriting & Mortgage Company, Complainants herein. In truth and in fact, the Western Underwriting & Mortgage Company is the pledgee only of said 251 shares, which said shares of stock were, without authority of the Western Underwriting & Mortgage Company, and without consideration therefor, caused by one J. K. Tennant to be transferred from his name to the name of the Western Underwriting & Mortgage Company and that said shares of stock so



purporting to be issued to the Western Underwriting & Mortgage Company were in truth and in fact the stock of the said J. K. Tennant, and were at said time and now are held by the Western Underwriting & Mortgage Company as security only for the payment of a note for \$40,000 given by the said J. K. Tennant to Complainant here.

“And your orator further alleges in this connection, that, since the date of the purported issuance of said stock to Western Underwriting & Mortgage Company, under the conditions hereinabove set forth, the said J. K. Tennant has at all times refused to vote said stock at any meeting of stockholders of the Union Bank & Trust Company.

“Your orator further alleges that it would have been useless to appeal to the stockholders of The Union Bank & Trust Company to bring this action for the reason that under the Articles of Incorporation of the said Union Bank & Trust Company and the laws of the State of Arizona, the stockholders of a corporation are without power to bring such an action acting as a body aggregate, or to compel the bringing of such action by the board of directors, any of its officers, or by anyone else.”

### X.

Your orator alleges that this is a civil suit in the nature of a bill in equity and that the matter in dispute exceeds, exclusive of costs and interest, the sum of Three Thousand (\$3,000.00) dollars and that

there has been no collusion between your orator and defendants, or either of them, or the officers thereof, for the purpose of conferring jurisdiction upon this Court. That under these circumstances, the interference of a court of equity for the protection of the rights of your orator and of other stockholders similarly situated is imperatively required to the end that the assets of the Union Bank & Trust Company so as your orator alleges fraudulently and unlawfully dissipated, and so assigned and transferred to The Valley Bank of Phoenix shall be replaced in the treasury of the Union Bank & Trust Company for the benefit of your orator [15] and other stockholders similarly situated.

INASMUCH, THEREFORE, as your orator has no adequate remedy at law for the redress of grievances complained of and can have relief only in equity, your orator files this bill of complaint in behalf of itself and all other stockholders of The Union Bank & Trust Company similarly situated or who may care to intervene in these proceedings and prays for equitable relief as follows:

(1) That defendant, The Valley Bank of Phoenix, be required to answer the matters and things charged in this bill of complaint, but not under oath, answer under oath being hereby waived, and particularly that said defendant be required to disclose unto this Honorable Court every and all assets, securities, choses in action or possession, or other assets whatsoever received by said The Valley Bank of Phoenix from The Union Bank & Trust Company under all assignments and transfer thereof, assigning or trans-



ferring any assets, securities, choses in action or possession by said The Union Bank & Trust Company to The Valley Bank of Phoenix by virtue of a certain contract and agreement entered into between said defendants on the 30th day of December A. D. 1913.

(2) That defendant, The Valley Bank of Phoenix, be required in said answer to make full and complete disclosure unto this Honorable Court of the disposition by it of any and all of said assets with full and complete disclosure of any and all amounts by said The Valley Bank of Phoenix collected out of said assets so by it received from The Union Bank & Trust Company, under the terms of said contract.

(3) For the decree of this Honorable Court adjudging the transfer by The Union Bank & Trust Company to The Valley Bank of Phoenix of all of the assets, securities and choses in action included in and transferred under the terms of that [16] certain contract entered into between said defendants on the 30th day of December, A. D. 1913, be declared to be null and void and of no force and effect whatever, and that said The Valley Bank of Phoenix be required to retransfer all said assets and securities so by it received, to The Union Bank & Trust Company for the benefit of your orator and all other stockholders similarly situated, or in the event said reassignment and retransfer of said assets and securities cannot be had, that said The Valley Bank of Phoenix be required to pay to The Union Bank & Trust Company for the benefit of your orator and other stockholders similarly situated, the just,

fair and reasonable value in money of any assets which by reason of the disposition, sale or alienation thereof by The Valley Bank of Phoenix, said bank is unable to reassign and transfer to the Union Bank & Trust Company.

(4) For a decree of this Honorable Court that the execution and delivery of a certain promissory note dated May 13th, 1913, for the sum of One Hundred Sixty-four Thousand Four Hundred Thirty-two and 46/100 Dollars (\$164,432.46) be declared to be without consideration, fraudulent and void as against your orator and other stockholders similarly situated and that said promissory note be canceled and returned to The Union Bank & Trust Company for the benefit of your orator and other stockholders similarly situated.

(5) That a writ of subpoena may be granted to your orator to be directed to defendants and each of them, thereby requiring defendants to appear on a certain day before this Court and then and there full, true, direct and perfect answer make to all and singular the premises (but not under oath, an answer under oath being hereby expressly waived), and further to perform and abide by such further order, direction or decree therefor, as to this Court shall seem just and proper.

(6) That your orator have such other and further relief [17] as to this Honorable Court may seem



just and equitable in the premises. And your orator will ever pray.

A. J. MORGANSTERN,  
400-407 Tinken Building, San Diego, Cal.,  
C. A. A. McGEE,  
400-407 Tinken Building, San Diego, Cal.,  
E. J. HENNING,  
400-407 Tinken Building, San Diego, Cal.,  
E. E. HENDEE,  
400-407 Tinken Building, San Diego, Cal.,  
GEORGE J. STONEMAN,  
Goodrich Block, Phoenix, Arizona,  
REESER M. LING,  
Goodrich Block, Phoenix, Arizona,  
Solicitors for Complainant. [18]

State of California,  
County of San Diego,—ss.

C. R. Fitz Gerald, being first duly sworn, deposes and says that he is the President of the Western Underwriting & Mortgage Company, a corporation organized and existing under the laws of the State of California, complainant above named; that he has read the foregoing bill of complaint and knows the contents thereof and that the same is true of his own knowledge, except as to those matters therein stated to be alleged upon information and belief and as to those matters he believes it to be true.

C. R. FITZ GERALD.

Subscribed and sworn to before me this 3d day of  
March, A. D. 1914.

[Seal]

H. B. DANIEL,

Notary Public in and for the County of San Diego,  
State of California.

My commission expires October 22d, 1916. [19]

**Exhibit "A" [to Complaint—Agreement].**

THIS AGREEMENT made and entered into this  
27th day of January, 1912, by and between the  
Union Bank and Trust Company, a corporation, of  
Phoenix, Arizona, party of the first part, and J. F.  
Cleaveland, John P. Orme, George H. N. Luhrs and  
J. M. Swetnam, parties of the second part, and The  
Valley Bank of Phoenix, a corporation of Phoenix,  
Arizona, party of the third part,

WITNESSETH: That the party of the first part,  
for and in consideration of the agreements of the said  
party of the third part that it will pay all of the de-  
positors in the bank of said first party the amount  
due them from said Union Bank & Trust Company  
as the same shall be demanded; also pay all of the  
banks the amount due such banks from the Union  
Bank & Trust Company as the same shall be de-  
manded; also pay all taxes due to the Govern-  
ment of the United States, the territory of Arizona,  
the county of Maricopa and the city of Phoenix, as  
the same shall be demanded, also all outstanding  
certificates of deposit issued by the first party, as  
the same shall be due and payable; also pay all out-  
standing cashiers checks issued by said first party,  
as the same shall be due and payable, all as per  
schedule of indebtedness hereto attached and



marked exhibit "A" and made a part hereof; does hereby transfer, assign, deliver and set over to the said party of the third part absolutely, the following property, to wit:

All of the cash on hand and belonging to the party of the first part, all of the negotiable paper payable to it, properly endorsed; all of the bonds belonging to said first party; all stocks in other corporations belonging to or held by said first party, all of its claims, demands, equities and interests whatsoever which said first party has against any other person, corporation or copartnership or to or in or against the property of any other person, copartnership or corporation, a list of which said assets and property is hereto attached and marked exhibit "B" and made a part of this agreement. [20]

And the said parties of the second part hereby stipulate and agree to and with the said party of the third part, that they will and do hereby guarantee, jointly and severally, to the Valley Bank of Phoenix, the payment to the party of the third part of any deficiency which may remain at the end of three years from the date of this contract, unpaid, after applying all of the cash received and collected and all securities collected and reduced to cash, upon the amount of the indebtedness of the party of the first part which the said party of the third part has paid or will be obligated to pay under the terms of this compact; and that they, the said second parties, will also repay to said third party all costs and expenses which the said third party may incur in reducing said assets to cash or in collecting the moneys due on such securi-

ties and evidences of indebtedness as are collectible; said payments to be made by said second parties to said third parties at the expiration of three years from the date hereof, provided, however,

IT IS EXPRESSLY UNDERSTOOD and agreed by and between all the parties hereto that the liability of John P. Orme shall be limited to the payment by him of Five Thousand Dollars (\$5,000.00) to the party of the third part in full settlement of his guarantee and upon the payment of said sum he shall be released from any further liability.

IT IS FURTHER EXPRESSLY UNDERSTOOD AND AGREED that as between all of the above-named grantors, each of them shall be liable for the moneys paid said third party as hereinbefore set forth in the proportion that the stock owned and controlled by said individual guarantors shall bear to the total stock owned and controlled by all of said guarantors and that each of said guarantors is and shall be entitled to contribution from the other guarantors for moneys so paid by him over and above his pro rata, except that in no event shall John P. Orme be called upon to pay more than the sum of \$5,000. [21]

That the said third party for and in consideration of the delivery to it of the assets hereinabove mentioned, and the execution of this agreement by the parties of the first and second part hereby covenants and agrees to pay all of the specified debts mentioned in said schedule hereto attached and marked exhibit "A" and made a part hereof. And when such deficiency, if any there shall be, shall be paid by the parties of the second part, or any of them, then the



party of the third part shall reassign, transfer and deliver to the guarantors paying such deficiency all of said assets not reduced to cash then in the hands of said third party.

IN WITNESS WHEREOF the parties hereto have executed these presents the day and year first above written.

UNION BANK & TRUST COMPANY.

By J. F. CLEVELAND,

President.

[Seal]

Attest: HARRY L. SHEDD,

Cashier.

JOHN P. ORME,

J. F. CLEVELAND,

J. M. SWETNAM,

GEO. H. N. LUHRS,

Parties of Second Part.

THE VALLEY BANK OF PHOENIX.

By E. J. BENNITT,

President.

[Seal]

Attest: LLOYD B. CHRISTY,

Cashier. [22]

Territory of Arizona,

County of Maricopa,—ss.

Before me, I. B. Noyes, a notary public in and for said county, Arizona territory, on this day personally appeared J. F. Cleaveland and Harry L. Shedd, known to me to be the persons whose names are subscribed to the foregoing instrument as president and secretary of the corporation described in the foregoing instrument, and as such president and secretary acknowledged to me that they executed the same

for said corporation for the purpose and consideration therein expressed, as its free act and deed, and by each of them voluntarily executed.

Given under my hand and seal of office this 27th day of January, A. D. 1912.

[Seal]

J. B. NOYES,

Notary Public.

My commission expires May 7, 1914.

Territory of Arizona,  
County of Maricopa,—ss.

Before me, I. B. Noyes, a notary public in and for said county, Arizona territory, on this day personally appeared E. J. Bennitt and Lloyd B. Christy, known to me to be the persons whose names are subscribed to the foregoing instrument as president and secretary of the corporation described in the foregoing instrument, and as such president and secretary acknowledged to me that they executed the same for said corporation, for the purpose and consideration therein expressed, as its free act and deed, and by each of them voluntarily executed.

Given under my hand and seal of office, this 27th day of January, A. D. 1912.

[Seal]

J. B. NOYES,

Notary Public.

My commission expires May 7, 1914.

Territory of Arizona,  
County of Maricopa,—ss.

Before me, J. B. Noyes, a notary public in and for the county of Maricopa, territory of Arizona on this day personally appeared John P. Orme, J. F. Cleaveland, J. M. Swetnam, Geo. H. N. Luhrs known to me



to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office, this 27th day of January, A. D. 1912.

[Seal]

J. B. NOYES,  
Notary Public.

My commission expires May 7, 1914. [23]

(EXHIBIT "A.")

First Mortgage, W. A. Goodwin	\$7,000.00	5 years
Fullerton, Cal.		
First Mortgage, W. H. Best	9,000.00	5 years
Brawley, Cal.		
First Mortgage, Jackson Deets	14,500.00	3 years
Uplands, Cal.		
First Mortgage, Guarantee Inv. Co.	2,050.00	3 years
Los Angeles, Cal.		
First Mortgage, Benton Turner	17,900.00	3 years
Los Angeles, Cal.		
First Mortgage, Rube Harrison,	12,000.00	3 years
San Diego, Cal.		
First Mortgage, Backer Vineyard Co.	15,000.00	3 years
Fresno, Cal.		
First Mortgage, W. H. O'Bryan	15,000.00	3 years
Los Angeles, Cal.		
First Mortgage, Pacific Utilities & Invest-		
ment Co.	9,900.00	3 years
Los Angeles, Cal.		

**Exhibit No. 1 [to Complaint—Contract and Agreement].**

**COPY.**

**THIS CONTRACT AND AGREEMENT** made and entered into this 30th day of December, 1913, by and between the Union Bank & Trust Company, of Phoenix, Arizona, party of the first part, and The Valley Bank of Phoenix, a corporation of Phoenix, Arizona, party of the second part, **WITNESSETH:**

WHEREAS, on the 27th day of January, 1912, the above-named parties entered into a contract and agreement wherein and whereby the said first party transferred and delivered to the said second party certain assets belonging to said first party, in consideration that said second party would pay all depositors in said bank of said first party, and also certain other indebtednesses of said first party, more particularly set forth and described in said agreement and contract, and in which said contract the said second party agreed with J. F. Cleaveland, John P. Orme, George H. N. Luhrs and J. M. Swetnam, hereinafter referred to as the guarantors, that they, the said guarantors, would pay to said second party, at the end of three years from the date of said contract, such sum of money as said second party shall have paid out in behalf of the first party, after deducting all moneys collected and realized by said second party out of and from said assets so transferred to said second party by said first party, as more particularly set forth in said contract and



agreement of January 27th, 1912, to which reference is hereby made for a more complete statement of the terms of said agreement, and     [25]

WHEREAS, the said second party now holds the note of the first party in the sum of One Hundred Sixty-four Thousand Four Hundred Thirty-two and 46/100 (\$164,432.46) Dollars, dated 17th day of May, 1913, falling due January 27, 1915, and given by first party in liquidation of its indebtedness to said second party under said contract upon the date of its said execution, and

WHEREAS, there remains unpaid upon said indebtedness approximately the sum of One Hundred and Three Thousand (\$103,000.00) Dollars, which exceeds the probable value of the securities now held by second party under said agreement in the estimated amount of Seventy-five Thousand (\$75,000.00) Dollars, and which will make a probable deficit in said last-named amount to be collected out of the general assets of the first party, and

WHEREAS, the said party of the first part is the owner of and in possession of the assets set forth in exhibit "A" hereto attached which have a probable value less than said estimated deficit, and is willing to transfer and assign all of said assets to said second party in consideration that said second party shall release it from any further claim or liability to it under the aforesaid contract of January 27, 1912, and any further claim or liability under said note, and

WHEREAS, the said second party is willing to accept such additional assets set forth in schedule "A"

hereto annexed and release said first party of and from any and all claims to date, on the express understanding and condition, however, that the acceptance of said assets and [26] such release by said second party shall not affect or interfere with, change or modify the guaranty, indemnity and liability assumed and agreed upon by said guarantors in and by said contract and agreement of January 27, 1912.

NOW, THEREFORE, this agreement witnesseth:

1. That the said party of the first part in consideration of the agreement on the part of the second party hereinafter contained and set forth, and pursuant to the authority and resolution of its board of directors duly given and adopted at a meeting called for that purpose, does hereby transfer and assign and set over unto the said Valley Bank of Phoenix, each, all and every the property and assets set forth and specified in schedule "A" hereto annexed and made a part hereof;

TO HAVE AND TO HOLD the same for its own use and benefit, and with full power to handle, sue for, collect, release or otherwise deal with, the same, as may be necessary or convenient, and with full power to do any and everything which the said first party could or might do in the premises in connection with said assets or any of them, had this assignment and transfer not been made; and deliver any and all other instruments or documents which may be necessary or convenient for the proper transfer or conveyance of said assets or any of them, or of the interest of the first party in or to them or any of them.



2. The party of the second part in consideration of the said transfer and assignment aforesaid does hereby [27] release and discharge the said first party of and from any and all claims and demands to the date hereof; PROVIDED, however, that such release shall in no way affect the rights and privileges now held and possessed by the said second party against the said guarantors, arising out of or by virtue of the said contract and agreement of January 27, 1912, hereinbefore referred to.

3. And it is understood and agreed between the parties hereto, for the protection and in the interest of said guarantors, that the said second party shall proceed with all due diligence and all reasonable dispatch, having due regard for the nature of the said assets so delivered to it, to handle and collect the same and reduce the same to cash, and apply the same in the settlement of said indebtedness, as contemplated by said contract of January 27, 1912.

IN WITNESS WHEREOF, the parties hereto have executed these presents the day and year first above written.

THE UNION BANK & TRUST COMPANY.

By JOHN P. ORME,  
Vice-president.

[Seal]

Attest: A. H. KLEIN,  
Secretary.

THE VALLEY BANK OF PHOENIX,

By E. J. BENNITT,  
Its President.

[Seal]

Attest: LLOYD B. CHRISTY,  
Secretary. [28]

The undersigned being the persons named in the foregoing agreement and therein referred to as the guarantors, each for himself consents to the release of the Union Bank & Trust Company from further claim or liability of the Valley Bank upon the indebtedness of said Union Bank & Trust Company to said Valley Bank in consideration of the transfer by said Union Bank & Trust Company to said Valley Bank of the additional assets in said agreement named and specified, and agrees not to urge such release from liability as a defense to any action which the said Valley Bank may hereafter bring against him either individually or with any of said guarantors, but this waiver is to be strictly construed and is to be limited to such defense, and nothing herein contained shall defeat, impair, or prejudice any other defense which may now exist or which may hereafter arise in favor of us, or any of us, in any such action or suit.

(Signed) J. F. CLEVELAND.

(Signed) JOHN P. ORME.

(Signed) GEORGE H. N. LUHRS.

(Signed) J. M. SWETNAM. [29]

**Exhibit No. 2 [to Complaint—List of Assets].**

**LIST OF ASSETS TO BE TRANSFERRED BY  
UNION BANK & TRUST COMPANY TO THE  
VALLEY BANK UNDER THE FOREGOING  
AGREEMENT.**

**PROMISSORY NOTES AND MORTGAGES.**

Richard Allen, dated July 9, 1912, due Oct. 9, 1912.



Consolidated Mines Co. of Arizona, dated Aug. 2, 1912, due demand.

J. R. Hughes, dated Jan. 9, 1912, due demand.

J. R. Hughes, dated Feb. 10, 1912, due demand.

J. R. Hughes, dated Feb. 26, 1912, due demand.

H. F. Jordan, dated Oct. 22, 1912, due Nov. 22, 1912.

F. H. Thompson, dated Nov. 18, 1912, due Dec. 18, 1912.

F. H. Thompson, dated Oct. 26, 1912, due Dec. 26, 1912.

J. F. Cleaveland, dated May 27, 1913, due May 27, 1914.

J. F. Cleaveland, dated May 27, 1913, due May 27, 1914.

Seaborn and Ida E. Stone, dated Sept. 1, 1912, due Sept. 1, 1913.

Seaborn and Ida E. Stone, dated Sept. 1, 1912, due Sept. 1, 1914.

(Secured by First Mortgage on about 1000 acres of land in San Diego Co., Cal., said to be worth about \$35,000.)

Mary B. Lewis, dated Feb. 25, 1913, due Feb. 25, 1918.

Mary B. Lewis, dated Feb. 25, 1913, due Feb. 25, 1918.

(Secured by first mortgage on improved residence property, City of Los Angeles, said to be worth about \$20,000.)

Ellen May Barnhard, dated Sept. 18, 1912, due Sept. 18, 1915.

(Secured by first mortgage on Lot 7, Blk. 49, Churchill Addn., improved with house, property said to be worth about \$2,500.)

Anna and J. A. Lewis, dated April 5, 1912, due April 5, 1913.

(Secured by 1st mortgage, Lot 7, Blk. 18, Collins Addn., said to be worth amout \$800.00.)

J. M. Phelps, dated Feb. 26, 1912, due Aug. 26, 1912.

(Secured by chattel mortgage, horses and wagon, chattel said to be dead or N. G.)

Richard W. Bishop, dated Apr. 6, 1912, due Oct. 6, 1912.

(Secured by 4 horse on 6 Bar Ranch, Squaw Creek.)

C. M. Cope, dated Nov. 15, 1912, due May 15, 1913.

(Supposed to be secured by 14 milch cows, but no record of such mortgage.)

W. S. Furman, dated Sept. 17, 1912, due Oct. 17, 1912.

(Chattel mortgage office furniture.)

Fred Younge, dated April 22, 1912, due April 22, 1913.

(His father, Levi Younge, has promised to protect.)

Alexandria Moore, dated Mar. 5, 1913, due June 5, 1913.

(Guaranteed by attorney Lewis T. Carpenter.)

Lucinda Lewis, dated Sept. 30, 1911, due Sept. 30, 1914.

(Secured by Realty Contract said to be worth about \$500.) [30]



**Exhibit No. 3 [to Complaint—Bonds].**

**BONDS.**

22 Bonds San Diego County Road District Improvement #1 Bonds, 6%.

**REAL ESTATE.**

Lot 27, Blk. 24, Capitol Addn., due from Mrs. Eddy on contract.

Lot 1 & N.½ Lot 3, Blk. 5, Grand Ave. Addn., due from Barkley on contract.

Lots 5 and 6, Thomas Tract, due from **Mr. Love** on contract.

Lot 5, Block 44, Spaulding Subdvn., mortgage on same \$1,100.

Lot 25, Block 1, Brown & Holsinger Tract, Germania Place, W.½, SE.¼ of NW.¼ Sec. 3, Tl. Nr. 3 E., G&SB&M. (Mortgage on same \$1,200.)

NW.¼ and N.½ and SW.¼ of the NE.¼ of Sec. 34 TLE of G&SB&M.

Furniture and fixtures.

Lease of bank building. [31]

**Exhibit No. 4 [to Complaint—Quitclaim Deed].**

**QUITCLAIM DEED.**

This indenture made this 31st day of December, 1913, between the Union Bank & Trust Company, a corporation of Phoenix, Arizona, party of the first part, and The Valley Bank of Phoenix, a corporation of the same place, party of the second part,

WITNESSETH: That the said party of the first part, for and in consideration of the sum of one dollar and other valuable consideration, to it in hand paid by the said second party, the receipt whereof

is hereby acknowledged and confessed, has remised, released, conveyed and quitclaimed, and by these presents does hereby release, remise, convey and quitclaim unto the said party of the second part, and to its successors and assigns, forever, all the right, title, interest, claim, demand and equity which the said party of the first part has in and to the following described real estate and property situate in the County of Maricopa and State of Arizona, to wit:

(1) Lot twenty-seven (27) in Block twenty-four (24) of Capitol Addition to the City of Phoenix, Arizona, according to the map or plat of said Capitol Addition now on file in the office of the County Recorder of Maricopa County, Arizona.

(2) Lot One (1) and the north half (N.1/2) of Lot Three (3) in Block Five (5) of Grand Avenue Addition to the City of Phoenix, Arizona, according to the map or plat of said Grand Avenue Addition to the City of Phoenix, now on file in the office of the County Recorder of Maricopa County, Arizona.

(3) Lots Five (5) and Six (6) in Thomas Tract according to the map or plat of said Thomas Tract, now on file in the office of the County Recorder of Maricopa County, Arizona.

(4) Lot Five (5) in Spaulding's Subdivision of Block forty-four (44) of Churchill's Addition to the City of Phoenix, Arizona, according to the map or plat of said Spaulding's Subdivision now on file in the office of the County Recorder of Maricopa County, Arizona.

(5) Lot twenty-five (25) in Block One 9LO of Brown & Holsinger Tract (being a subdivision of



Germania Place) according to the map or plat of said Brown and Holsinger Tract now on file in the office of the County Recorder of Maricopa County, Arizona.

(6) The west half (W.1/2) of the Southeast quarter (SE.1/4) of the southwest quarter (SW.1/4) of the Northwest quarter (NW.1/4) of Section Three (3) in Township One North of Range Three East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona. [32]

(7) The northwest quarter (NW.1/4); the North half (N.1/2) and southwest quarter (SW.1/4) of the Northeast quarter (NE.1/4) of Section Thirty-four (34) in Township One North of Range One East of the Gila and Salt River Base and Meridian, in Maricopa County, Arizona; containing 280 acres more or less.

TO HAVE AND TO HOLD the aforesaid property, together with all and singular the appurtenances and privileges thereunto in anywise belonging or appertaining, and all the estate, right, title, interest and claim whatsoever, of the said party of the first part, in law and in equity, to the proper use, benefit and behoof of the said party of the second part, its successors and assigns forever.

IN WITNESS WHEREOF, the said party of the first part, pursuant to the authority given by resolution duly adopted by its Board of Directors at a meeting of said Board held on the 30th day of December, 1913, authorizing among other things the making of this conveyance, has caused these presents to be duly executed by its Vice-president and Secre-

tary, and its seal to be hereto affixed, this 31st day of December, 1913.

THE UNION BANK & TRUST COMPANY,

By JOHN P. ORME,

Its Vice-president.

[Seal]

Attest: A. H. KLEIN,

Its Secretary.

State of Arizona,

County of Maricopa,—ss.

Before me, I. J. Lipsvhn, a notary public in and for said county, Arizona State, on this day personally appeared John P. Orme and A. H. Klein, known to me to be the persons whose names are subscribed to the foregoing instrument, and as such vice-president and secretary respectively of the corporation described in the foregoing instrument, and as such vice-president and secretary acknowledged to me that they executed the same for said corporation, for the purposes and consideration therein expressed, as its free act and deed, and by each of them voluntarily executed.

Given under my hand and seal of office, this 31st day of December, A. D. 1913.

[Seal]

I. J. LIPSVHN,

Notary Public.

My Commission Expires 2/16/1916. [33]

**Exhibit No. 5 [to Complaint—Assignment and Transfer].**

KNOW ALL MEN BY THESE PRESENTS: That the undersigned, the Union Bank & Trust Company, a corporation of Phoenix, Arizona, for a valuable consideration to it paid by the Valley



Bank of Phoenix, a corporation of the same place, does hereby assign and transfer unto the said Valley Bank of Phoenix all its right, title and interest in and to that certain lease made between D. Nicholson and wife with the undersigned, dated the 2d day of June, 1909, and pertaining to the four rooms on the ground floor of the Nicholson Building, situated at No. 30 N. Center St., in the City of Phoenix, Arizona, and at present occupied by the undersigned as its banking offices.

TO HAVE AND TO HOLD the said lease and all rights, privileges and benefits thereunder and arising therefrom and subject to the payment of the accruing rent as specified in said lease.

IN WITNESS WHEREOF the said party of the first part, pursuant to the authority given by resolutions adopted by its board of directors at a meeting of said board held this 30th day of December, 1913, has caused these presents to be duly executed by its Vice-president and Secretary this 30th day of December, 1913.

THE UNION BANK & TRUST COMPANY,

By JOHN P. ORME,

Vice-president.

[Seal]

Attest: A. H. KLEIN,

Its Secretary.

State of Arizona,

County of Maricopa,—ss.

Before me, I. J. Lipsvhn, a notary public in and for said county, Arizona State, on this day personally appeared John P. Orme and A. H. Klein, known to me to be the persons whose names are sub-

scribed to the foregoing instrument as vice-president and secretary respectively of the corporation described in the foregoing instrument, and as such vice-president and secretary acknowledged to me that they executed the same for said corporation, for the purposes and consideration therein expressed, as its free act and deed, and by each of them voluntarily executed.

Given under my hand and seal of office, this 30th day of December, A. D. 1913.

[Seal]

I. J. LIPSVHN,  
Notary Public.

My Commission Expires 2/16/1916. [34]

**Exhibit No. 6 [to Complaint—Bill of Sale].**

**BILL OF SALE.**

KNOW ALL MEN BY THESE PRESENTS: That the Union Bank & Trust Company, a corporation of Phoenix, Arizona, for and in consideration of the sum of one dollar and other valuable considerations to it in hand paid by the Valley Bank of Phoenix, a corporation of the same place, does by these presents bargain, sell and convey unto the said Valley Bank of Phoenix, its successors and assigns, all of the personal property mentioned and set forth in Schedule A hereto attached, which said schedule is made a part of this Bill of Sale.

TO HAVE AND TO HOLD the aforesaid property unto the said party of the second part, its successors and assigns forever, hereby agreeing to warrant and defend the sale of the said property, goods and chattels against all and every person or persons whomsoever lawfully claiming or to claim the same.



IN WITNESS WHEREOF the said party of the first part, pursuant to the authority given by resolutions adopted by its board of directors at a meeting of said board held this 30th day of December, 1913, has caused these presents to be duly executed by its Vice-President and Secretary this 30th day of December, 1913.

THE UNION BANK & TRUST COMPANY,  
By JOHN P. ORME,  
Vice-President.

[Seal]

Attest: A. H. KLEIN,  
Secretary.

State of Arizona,  
County of Maricopa,—ss.

Before me, I. J. Lipsvhn, a notary public in and for said county, Arizona State, on this day personally appeared John P. Orme and A. H. Klein, known to me to be the persons whose names are subscribed to the foregoing instrument as vice-president and secretary respectively of the corporation described in the foregoing instrument, and as such vice-president and secretary acknowledged to me that they executed the same for said corporation, for the purposes and consideration therein expressed, as [35] its free act and deed, and by each of them voluntarily executed.

Given under my hand and seal of office this 30th day of December, A. D. 1913.

[Seal]

I. J. LIPSVHN,  
Notary Public.

My Commission Expires 2/16/1916. [36]

**Exhibit No. 7 [to Complaint—Schedule of Furniture and Fixtures].**

**SCHEDULE OF FURNITURE AND  
FIXTURES.**

**FURNITURE:**

- 1 Large Directors Table. (Mahogany.)
- 1 Small Office Table. (Mahogany.)
- 3 Mahogany Roll Top Desks.
- 1 Mahogany Letter File and Stand.
- 12 Mahogany Arm Chairs.
- 1 Swivel Desk Chair with leather cushion.  
(Mahogany.)
- 1 Swivel Desk Chair. (Mahogany.)
- 2 Rugs.
- 6 Cuspidors. (Brass.)
- 1 Pike Adding Machine No.185392.
- 1 Burroughs Adding Machine No. 146047, Size 9.
- 4 High Desk Stools.
- 1 Coin Changer.
- 1 Protectograph No. 68274, Model G.
- 1 Oscilating Electric Fan.
- 1 Brass Electric Desk Fan.
- 2 Mahogany Typewriter Desks.
- 2 Mahogany Typewriter Desk Chairs.
- 2 Straight Back Chairs. (Mahogany.)
- 1 Underwood Typewriter Model 3, 12 inch.
- 1 Remington Typewriter Model 10.
- 1 Case of 50 Safe Deposit Boxes in Vault.
- 1 Filing Cabinet and Case in Vault.
- 1 Chair in Vault.
- 1 Oak Standing Desk.



- 1 Mahogany Double Standing Desk.
- 1 Diebold Safe.
- 2 Stepladders.
- 1 Stove.
- 1 Settee in Lobby, with Leather Cushion.

# **FIXTURES:**

Consisting of all counters, partitions, grills, cupboards, Cloak and Telephone Booths, Shelving, Doors, Curtains, Door to Vault, Electrical Fixtures, platforms, customers desks, mahogany wall clock.

Also any other fixtures or furniture that was used and owned by the Union Bank & Trust Company in conducting a banking business, located at the northwest intersection of Central Ave., and Broadway, known as the Nicholson Building, in the City of Phoenix, Ariz.

# **1 HUDSON ROADSTER AUTOMOBILE.**

All of the above Furniture and Fixtures are the property of the Union Bank and Trust Company and are at present situated in its banking office in the aforesaid Nicholson Building in the City of Phoenix, Arizona, and the same together with the aforesaid automobile are the personal property referred to and intended to be conveyed by the foregoing Bill of Sale.    [37]

## **Exhibit No. 8 [to Complaint—Assignment].**

KNOW ALL MEN BY THESE PRESENTS that the undersigned, The Union Bank & Trust Company, a corporation of Phoenix, Arizona, for value received, does hereby assign, transfer and set over unto the Valley Bank of Phoenix, a corporation, of Phoenix, Arizona, these two certain indentures of

mortgage, more particularly described as follows, to wit:

1. Mortgage, dated the 25th day of February, 1913, executed by Mary B. Lewis to the Union Bank & Trust Company, the undersigned, to secure the payment of one certain note made by said mortgagor to said mortgagee, dated on said date, in the sum of \$2,000, with interest, which said mortgage is recorded in Book 3339 of Mortgages at page 171 thereof, County Records of Los Angeles County, State of California, and which said mortgage covers the following described premises:—Lot 313 in Burk's Golden Tract, in the City of Los Angeles, in the County of Los Angeles, and State of California.  
and

2. Mortgage, dated the 25th day of February, 1913, executed by Mary B. Lewis to the Union Bank & Trust Company, the undersigned, to secure the payment of one promissory note made by said mortgagor to said mortgagee, dated on said date, in the sum of \$10,000.00, with interest, which said mortgage was recorded on the 5th day of March, 1913, in Book 3351 of Mortgages at page 42 thereof, County Records of Los Angeles County, State of California, and which mortgage covers the following described premises:—Lot 24 and the South half of Lot 23 in Block 20 of the Charles Victor Hall Tract, in the City of Los Angeles, Los Angeles County, State of California.

TO HAVE AND TO HOLD the above described mortgages, together with the respective debts and notes secured thereby, together with all rights, bene-



fits, privileges and moneys arising and to arise therefrom and thereunder, including the right to settle, compromise, release, sue for, collect, foreclose the [38] same or any part thereof, and to do any and everything necessary or proper in connection with the said mortgages and the debts thereby secured, to the same extent and to the same effect, as the undersigned might or could have done in the premises, had this assignment not been made; hereby giving and granting unto the said The Valley Bank of Phoenix, its successors and assigns full authority and right in the premises, to exercise full and complete ownership in and over said mortgages and the debts thereby secured, either in its own name or in the name of the undersigned, as said Valley Bank of Phoenix, may deem advisable or convenient, but at its own cost and expense.

IN WITNESS WHEREOF the said Union Bank & Trust Company, pursuant to the authority given by resolution duly adopted by its Board of Directors at a meeting of said Board held at its office in the City of Phoenix, Arizona, on the 30th day of December, 1913, has caused these presents to be duly executed in its name by its vice-President and Secretary, and its seal to be hereunto affixed, this 31st day of December, 1913.

THE UNION BANK & TRUST COMPANY.

By JOHN P. ORME,

Its Vice-President.

[Seal]

Attest: A. H. KLEIN,

Its Secretary.

State of Arizona,

County of Maricopa,—ss.

Before me, I. J. Lipsvhn, a notary public in and for said county, Arizona State, on this day personally appeared John P. Orme and A. H. Klein, known to me to be the persons whose names are subscribed to the foregoing instrument as vice-president and secretary respectively of the corporation described in the foregoing instrument, and as such vice-president and secretary acknowledged to me that they executed the same for said corporation, for the purposes and consideration therein expressed, as its free act and deed, and by each of them voluntarily executed.

Given under my hand and seal of office, this 31st day of December, A. D. 1913.

[Seal]

I. J. LIPSVHN,  
Notary Public.

My Commission Expires 2/16/1916. [39]

**Exhibit No. 9 [to Complaint—Assignment].**

KNOW ALL MEN BY THESE PRESENTS that the undersigned, The Union Bank & Trust Company, a corporation of Phoenix, Arizona, for value received from the Valley Bank of Phoenix, a corporation of Phoenix, Arizona, does hereby assign, transfer and set over unto the said Valley Bank of Phoenix, all the right, title, interest, claim, demand, equity, benefits, privileges and moneys arising out of and to arise out of and collectible and receivable under and by virtue of that certain escrow and trust declaration made by The Los Angeles Trust and



Savings Bank, of Los Angeles, State of California, dated December 26, 1913, and which escrow and trust declaration relates to two certain notes executed by Seaborn Stone and Ida E. Stone to Clarence M. Libbey, one of said notes being for \$6,500 due one year from September 1st, 1912, and the other of said notes being for \$6,500 due 2 years from September 1st, 1912; and which escrow and declaration also relates to Certificate No. 92 for 65 shares of the preferred stock of the undersigned corporation, and also the matter of the disposition of the proceeds of said notes and the division of said shares of stock, as more fully appears and is set forth in said escrow and declaration.

It being the intention of this instrument to convey to the said Valley Bank of Phoenix, all the right, title and interest which the undersigned has in and to said notes, and the mortgages securing the payment of the same, and also in and to all rights and benefits accruing and arising from and under said escrow and declaration; hereby giving and granting and conveying to said Valley Bank of Phoenix, its successors and assigns all the rights and benefits which the undersigned would have and has in and to said notes, mortgages and escrow, had this assignment not have been made.

And the said Los Angeles Trust & Savings Bank is [40] hereby authorized, empowered and directed to pay over all moneys payable to the undersigned under and by virtue of the aforesaid escrow and trust declaration, to the said Valley Bank of Phoenix, its successors or assigns, and to deal with

said Valley Bank of Phoenix, its successors or assigns in connection with the said escrow and declaration and the matters therein referred to, the same as though the said Valley Bank of Phoenix had been the original party thereto in the place and stead of the undersigned.

IN WITNESS WHEREOF the said Union Bank & Trust Company, pursuant to the authority given by resolution duly adopted by its Board of Directors at a meeting of said Board held at its office in the City of Phoenix, Arizona, on the 30th day of December, 1913, has caused these presents to be duly executed in its name by its vice-President and Secretary, and its seal to be hereunto affixed, this 31st day of December, 1913.

THE UNION BANK & TRUST COMPANY.

By JOHN P. ORME,

Its Vice-President.

[Seal]

Attest: A. H. KLEIN,

Its Secretary.

State of Arizona,

County of Maricopa,—ss.

Before me, I. J. Lipsvhn, a notary public in and for said county, Arizona State, on this day personally appeared John P. Orme and A. H. Klein, known to me to be the persons whose names are subscribed to the foregoing instrument as vice-president and secretary respectively of the corporation described in the foregoing instrument, and as such vice-president and secretary acknowledged to me that they executed the same for said corporation for the purposes and consideration therein expressed, as its free



act and deed, and by each of them voluntarily executed.

Given under my hand and seal of office this 31st day of December, A. D. 1913.

[Seal]

I. J. LIPSVHN,  
Notary Public.

My Commission Expires 2/16/1916. [41]

**Exhibit No. 10 [to Complaint—Receipt].**

Phoenix, Arizona, December 31, 1913.

RECEIVED of The Union Bank & Trust Company the following items transferred to us under and by virtue of that certain contract and agreement bearing date the 30th day of December, 1913; Road District Imp. No. 1, County of San Diego, State of Calif. Bonds Nos. 29 to 50, both inclusive, amounting at face value to \$7,123:50;

Notes as follows:

Richard Allen .....	\$261.00	
Consolidated Mines Co. ....	500.00	
J. R. Hughes.....	75.50	
J. R. Hughes.....	25.00	
J. R. Hughes.....	37.00	
H. F. Jordan.....	15.00	
F. H. Thompson.....	50.00	
Do. ....	100.00	
J. P. Cleaveland.....	4,184.76	To be paid if the
Do. ....	3,260.00	notes covering
		stock sales made
		by him for J. K.
		Tennant are not
		paid.
Mary B. Lewis) Add cost	2,000.00	(Secured by mort-
Do. ) of Ins. \$55.00.	10,000.00	gage)
Ellen May Bernard .....	275.00	Balance
Anna & J. Lewis.....	121.40	Balance (Sec. by
		Mtge)
J. M. Phelps.....	337.53	Balance
Richard W. Bishoff.....	235.00	Balance

C. M. Cope.....	1,138.20	
W. S. Furman.....	150.00	Bank holds office furniture a/c chat. mtg. (SH)
Fred Young .....	200.00	Balance
Alexander Moore .....	36.00	
Lucinda Lewis .....	97.16	Balance

Insurance policy Phoenix Assurance Co., Ltd., No.  
307619 favor Lucinda Lewis.

Insurance policies The Svea Insurance Co., Nos.  
213713-4 in favor Mary B. Lewis.

# Abstract of Title:

Part of Sec. 19 1 S. 4 W. Oscar C. Price.

Lot 25, Brown Holsinger tract.

N. W.  $\frac{1}{4}$  N.  $\frac{1}{2}$  of N. E.  $\frac{1}{4}$  & S. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$   
of Sec. 34, C. M. Cope.

Lot 1 N.  $\frac{1}{3}$  of Lot 3, Block 5, Grand Ave. Addn.,  
W. T. Barkley.

Lot 7, Block 18, Collins Addition, J. A. Lewis.

S.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  Sec. 14, T. 1 N. R. 2, Wm. L.  
Love.

Lot 9, Blk. 18, Collins Addn., Lucinda Lewis.

W. 168 ft. Lot B, Block 1 Railroad Place, Jos. C.  
Green.

Lot 27, Block 24, Capitol Addition, Mrs. Eddy  
Warranty deeds;

Union B. & T. Co. to Parker L. Wood, an. re-  
corded.

Parker L. Woodman, Tr. to Union B. & T. Co.,  
not recorded.

Margaret Pecks to W. T. Barkley.

Walter D. Sutter to Union B. & T. Co.

# Contracts:



B. G. Pecks to Wm. L. Love.

B. G. Pecks to W. T. Barkley.

B. G. Pecks to Eva S. Eddy.

Received—THE VALLEY BANK OF PHOENIX,  
By S. H. STUART,  
Asst. Cashier.     [42]

[Endorsements]: E-20. (Phoenix.) In the District Court of the United States, in and for the District of the State of Ariz., Western Underwriting & Mortgage Co., a Corporation, Complainant, vs. The Valley Bank of Phoenix, a Corporation, and The Union Bank & Trust Co., a Corporation, Defendants. Complaint. In Equity. Filed Mar. 5, 1914, at — M. George W. Lewis, Clerk. By Robert E. L. Webb, Deputy. Law Offices, Stone-man & Ling, 405, 406 and 407 Goodrich Block, Phoenix, Arizona.     [43]

**[Subpoena Ad Respondendum.]**

UNITED STATES OF AMERICA.

*District Court of the United States, District of  
Arizona.*

IN EQUITY.

The President of the United States, Greeting: To  
The Valley Bank of Phoenix, a Corporation,  
and The Union Bank & Trust Company, a Cor-  
poration, Both Organized Existing and Doing  
Business Under the Laws of the State of Ari-  
zona.

YOU ARE HEREBY COMMANDED, That you  
be and appear in said District Court of the United  
States, District of Arizona, at the courtroom in

Phoenix, Arizona, twenty days from the date hereof, to answer a bill of complaint exhibited against you in said court by Western Underwriting & Mortgage Company, a corporation organized and existing under the laws of the State of California, and to do and receive what the said Court shall have considered in that behalf.

WITNESS, the Honorable WILLIAM H. SAWTELLE, Judge of said District Court, this 5th day of March, in the year of our Lord one thousand nine hundred and fourteen and of our Independence the 138.

[Seal]

GEORGE W. LEWIS,  
Clerk.

By Robert E. L. Webb,  
Deputy Clerk.

Memorandum Pursuant to Rule 12, Rules of Practice for the Courts of Equity of the United States.

YOU ARE HEREBY REQUIRED to file your answer or other defense in the above suit, on or before the twentieth day after service, excluding the day thereof, of this subpoena, of the clerk's office of said court, pursuant to said bill: otherwise the said bill may be taken *pro confesso*.

GEORGE W. LEWIS,  
Clerk.

By Robert E. L. Webb,  
Deputy Clerk. [44]

**United States Marshal's Return.**

Received this writ Mar. 7, 1914, at Phoenix, Arizona, and executed the same March 7, 1914, at Phoenix, Arizona, upon the within named defendant, the



Valley Bank of Phoenix, a corporation, by delivering a true and certified copy hereof, to which was attached a copy of the bill of complaint, to E. J. Bennett, personally, the said E. J. Bennett at the time being the president of the Valley Bank of Phoenix, corporation defendant.

At the same time and place I further executed this writ upon the within named defendant, the Union Bank & Trust Co., a corporation, by delivering a true and certified copy hereof, to which was attached a copy of the bill of complaint, to A. H. Klein, the said A. H. Klein at the time being the Secretary of the Union Bank & Trust Company, corporation defendant.

Return of this writ is made this 10th day of March, 1914, at Phoenix, Arizona.

J. P. DILLON,  
U. S. Marshal,  
By Chas. R. Price,  
Deputy.

Marshal's fees for service upon two persons: \$8.00.

[Endorsed]: Docket No. 386. No. E-20 (Phoenix). U. S. District Court District of Arizona in Equity. Western Underwriting & Mortgage Co., Complainant, vs. The Valley Bank of Phoenix & The Union Bank & Trust Co. Defts. Subpoena *Ad Respondendum*. Filed Mar. 11, 1914, at — M. Geo. W. Lewis, Clerk. By R. E. L. Webb, Deputy.

*In the District Court of the United States in and for  
the District of the State of Arizona.*

No.—E—20.

**WESTERN UNDERWRITING & MORTGAGE  
COMPANY**, a Corporation organized and ex-  
isting under the laws of the State of Califor-  
nia,

Complainant,

vs.

**THE VALLEY BANK OF PHOENIX**, a Corpora-  
tion, and **THE UNION BANK & TRUST  
COMPANY**, a Corporation, both organized,  
existing and doing business under the laws of  
the State of Arizona,

Defendants.

**Stipulation [of Facts].**

IT IS HEREBY STIPULATED, by and between  
George J. Stoneman, counsel for plaintiff above  
named, and C. F. Ainsworth, solicitor for defendant,  
The Valley Bank of Phoenix above named, that, sub-  
ject to the reservations hereinafter set forth the fol-  
lowing facts are admitted to be true without the ne-  
cessity on the part of plaintiff of introducing proof  
thereof:

**I.**

The execution by the parties named therein, of the  
contract designated in plaintiff's complaint as ex-  
hibit "A."

**II.**

The execution and delivery by the parties named



therein of the instrument designated in plaintiff's complaint as exhibit I.

III.

The execution and delivery of the quitclaim deed designated in plaintiff's complaint as exhibit 4.  
[45]

IV.

The execution and delivery of that certain assignment designated in plaintiff's complaint as exhibit 5.

V.

The execution and delivery of that certain bill of sale designated in plaintiff's complaint as exhibit 6.

VI.

The receipt by the Valley Bank of the schedule of furniture and fixtures designated in plaintiff's complaint as exhibit 7.

VII.

The execution and delivery of that certain instrument designated in plaintiff's complaint as exhibit 8.

VIII.

The execution and delivery of that certain instrument designated in plaintiff's complaint as exhibit 9.

IX.

The execution and delivery of that certain instrument designated in plaintiff's complaint as exhibit 10.

The stipulations and admissions hereinabove mentioned are made subject to the distinct understanding that the defendants, the Valley Bank of Phoenix, reserves the right to claim that any or all of the assets mentioned in any of the instruments hereinabove designated as exhibits, were intended to be and were

transferred from the Union Bank & Trust Company to the Valley Bank of Phoenix under the provisions of the contract dated January 27th, 1912, and contemporaneous parol contracts claimed by the Valley Bank to have been entered into at the time of execution of the said contract on January 27th, 1912. [46]

GEORGE J. STONEMAN,  
Attorney and Solicitor for Western Underwriting  
Company.

C. F. AINSWORTH,  
Attorney and Solicitor for the Valley Bank of  
Phoenix

Dated this 16th day of January, 1915. [47]

[Endorsements]: No. E-20. In the District Court of the United States, in and for the District of the State of Arizona. Western Underwriting & Mortgage Company, a Corporation, organized and existing under the laws of the State of California, Complainant, vs. The Valley Bank of Phoenix, a Corporation, and The Union Bank & Trust Company, a Corporation, both organized, existing and doing business under the laws of the State of Arizona, Defendants. Stipulation. Filed Jan. 21, 1915. George W. Lewis, Clerk. Law Offices Stoneman, 405, 406 and 407, Goodrich Block, Phoenix, Arizona. [48]



*In the United States District Court for the District  
of Arizona.*

Minute Entry Appearing Under Date of Friday,  
January 22, 1915, at Phoenix, Arizona.

No. E-20.

WESTERN UNDERWRITING & MORTGAGE  
CO.,

Plaintiff,

vs.

VALLEY BANK OF PHOENIX et al.,  
Defendants.

Trial of this case is this day resumed, pursuant to an order of adjournment made on yesterday, all counsel on both sides being present, including counsel for the intervernor herein, the witness, Joseph S. Jenckes, being upon the stand for further examination. Plaintiff moves the Court for leave to amend its complaint on file herein by inserting after line 19 on page 15 of said complaint following the words: "to commence such suit," being the closing of paragraph 9 of the bill of complaint herein, to wit:

"Your orator further alleges that W. L. Rosa, hereinabove mentioned, was the owner of the majority of the common stock entitled to be voted at a stockholders meeting of the Union Bank & Trust Company prior to he bringing of this action on March 5th, 1914, for that notwithstanding the fact that prior to the bringing of this action, there appeared upon the stock transfer books of the Union Bank & Trust Company,

a record purporting to fix the ownership of 251 shares of the common stock of said Union Bank & Trust Company in the Western Underwriting & Mortgage Company, complainants herein. In truth and in fact, the Western Underwriting & Mortgage Company is the pledgee only of said 251 shares, which said shares of stock were, without authority of the Western Underwriting & Mortgage Company, and without consideration therefor, caused by one J. K. Tennant to be transferred from his name to the name of the Western Underwriting & Mortgage Company and that said shares of stock so purporting to be issued to the Western Underwriting & Mortgage Company were in truth and in fact the stock of the said J. K. Tennant, and were at said time and now are held by the Western Underwriting & Mortgage Company as security only for the payment of a note for \$40,000 given by the said J. K. Tennant to complainant here. [49]

“And your orator further alleges in this connection, that, since the date of the purported issuance of said stock to Western Underwriting & Mortgage Company, under the conditions hereinabove set forth, the said J. K. Tennant has at all times refused to vote said stock at any meeting of stockholders of the Union Bank & Trust Company.”

“Your orator further alleges that it would have been useless to appeal to the stockholders of the Union Bank & Trust Company to bring this action for the reason that under the articles



of incorporation of the said Union Bank & Trust Company and the laws of the State of Arizona, the stockholders of a corporation are without power to bring such an action acting as a body aggregate, or to compel the bringing of such action by the Board of Directors, any of its officers, or by anyone else.”

to which proposed amendment the defendants by counsel object, AND IT IS ORDERED that the said objection be and the same is hereby overruled; AND IT IS ORDERED that the plaintiff be permitted to amend its complaint as requested; and thereupon, the defendant ask that the further trial of this case be continued in order to give them time to procure necessary testimony; AND IT IS ORDERED that this case be continued until the April term of this court at Phoenix. [50]

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**[Answer of Valley Bank of Phoenix to Amended Complaint.]**

*In the District Court of the United States, District of Arizona, at Phoenix, Arizona.*

No. E-20—(Phx.)

WESTERN UNDERWRITING AND MORTGAGE COMPANY, a Corporation, Organized and Existing Under the Laws of the State of California,

Complainant,

vs.

THE VALLEY BANK OF PHOENIX, a Corporation, and THE UNION BANK & TRUST

COMPANY, a Corporation, Both Organized and Existing and Doing Business Under the Laws of the State of Arizona,

Defendants.

Comes now the above-named defendant The Valley Bank of Phoenix, by C. F. Ainsworth, its attorney and solicitor, and for its answer to the amended complaint of the above-named complainant herein, respectfully shows and alleges:

1. It admits the allegations contained in paragraph marked "I" of the complaint herein.

2. It admits the allegations contained in paragraph marked "II" of the complaint herein.

3. It admits the allegations contained in paragraph marked "III" of the complaint herein.

4. It denies each and every of the allegations contained in paragraph marked "IV" of the complaint herein, except as herein expressly admitted; and this defendant further answering the allegations contained in said paragraph "IV" of the complaint herein, respectfully shows and alleges: [51]

That on the 27th day of January, 1912, and for some time prior thereto, the above-named defendant The Union Bank & Trust Company was financially embarrassed to such an extent as rendered it unable to meet its obligations and to further continue to carry on its banking business in so far as it related to the receiving of deposits of money and the withdrawal thereof by check or other order on it, as contemplated by its articles of incorporation and the laws of the State of Arizona, in such case made and



provided, and for the purpose of relieving itself of its obligations to promptly pay off and discharge its liabilities, and for the further purpose of preventing the closing of its doors by the bank comptroller of the State of Arizona, the said Union Bank & Trust Company and this defendant the Valley Bank of Phoenix, did enter into that certain contract and agreement referred to in said complaint herein and attached thereto as exhibit "A," to which contract and agreement reference is hereby made for a more complete description of the conditions and terms thereof; that simultaneously with the execution of said contract, and as part of the same transaction, this defendant and the said Union Bank & Trust Company entered into a verbal contract and agreement, wherein and whereby it was agreed and understood, that the said Union Bank & Trust Company should have the right, upon payment to this defendant of all moneys expended by this defendant under the terms of the aforesaid written contract (except such moneys as may have been repaid to it) to have all of the assets which were transferred to this defendant under the terms of the aforesaid contract of January 27th, 1912, (except such as may have been reduced to cash) returned to said Union Bank & Trust Company. And it was agreed at said time, that said written contract should not embody such verbal agreement aforesaid.

[52]

And this defendant further alleges and shows that while the said contract mentioned in said complaint herein and attached thereto as exhibit "A" provides that said assets therein referred to shall be and are

transferred to this defendant, absolutely, such transfer was made in that form in order to enable this defendant to more readily handle and collect such assets, in its own name.

This defendant further shows and expressly alleges that the said Union Bank & Trust Company, and this defendant understood and agreed at the time such transfer of said assets was made to this defendant, that such transfer of said assets was simply in the nature of a pledge for the repayment to this defendant of the moneys which this defendant should advance and pay out under the terms of the aforesaid written contract, with the added privilege however, of this defendant using and handling such assets in such manner as would reduce the same to cash as speedily as possible and advisable, and to apply the proceeds thereof towards the payment to this defendant of the moneys advanced and paid out by it under the terms of said written contract aforesaid.

And this defendant further alleges and shows that within a few days after the execution of the written contract of January 27th, 1912, aforesaid, this defendant and the said Union Bank & Trust Company, through its duly authorized officers entered into a parole agreement wherein and whereby the Union Bank & Trust Company, in consideration of its being permitted to use the banking furniture and fixtures and the premises theretofore used and occupied by it as a banking house in the City of Phoenix, Arizona, did agree to pay the rent to come due on said premises from time to time, and did further agree to proceed at once to reorganize said bank and



obtain new [53] assets for said company by the sale of shares of its capital stock and would use such portion of such new assets as might be necessary to pay off the amount of money expended and paid out by this defendant under the terms of the said contract of January 27th, 1912, aforesaid; and it was then and there further understood and agreed between said parties, that when the said Union Bank & Trust Company should pay to this defendant the full amount due this defendant for moneys expended and advanced and paid out by this defendant under the terms of said contract of January 27th, 1912, the said Union Bank & Trust Company should be thereupon entitled to a redelivery and return of all of the assets turned over to this defendant under said contract of January 27th, 1912, except such as had theretofore been reduced to cash and applied on the amount so expended by this defendant.

This defendant further shows and alleges that in pursuance of the agreements and understandings hereinabove referred to, both this defendant and the said Union Bank & Trust Company, ever since the making of said contract of January 27th, 1912, and up and until the making of the contract of December 30th, 1913, hereinafter referred to, treated and considered said assets so turned over to this defendant under the said contract of January 27th, 1912, as a pledge, and did also treat and consider the moneys so expended and paid out by this defendant under the terms of the said contract, as an indebtedness on the part of said Union Bank & Trust Company to this defendant, and did so carry said assets and said

indebtedness, on their respective account books, and said Union Bank & Trust Company did from time to time in its reports to the state auditor of the State of Arizona, report said assets as being held by this defendant for it, but subject to this defendant's claim thereto as security, and did report to said state auditor, as an indebtedness on its [54] part to this defendant, the amount claimed by this defendant for moneys paid by it and expended by it under the contract of January 27th, 1912, and not repaid to this defendant.

This defendant further alleges that said contract of January 27th, 1912, did not contain and it was not intended it should contain, any release or discharge on the part of this defendant to the said Union Bank & Trust Company, for any deficiency which may remain after the application of the proceeds derived from the assets so turned over to it by said Union Bank & Trust Company under the aforesaid contract of January 27th, 1912. That each and all of the persons and individuals who signed and subscribed the said contract, either as officers of the said Union Bank & Trust Company, or as sureties and guarantors, were at the time of such signing said contract, directors of said Union Bank & Trust Company.

This defendant further alleges, that pursuant to the requirements and terms of said contract of January 27th, 1912, it did pay off and discharge each and all of the debts and liabilities of the said Union Bank & Trust Company, as in said contract provided and referred to.

This defendant further alleges and shows to this



court that the persons mentioned and described in said complaint and contract, as the sureties for the said Union Bank & Trust Company, were not given by the terms of said contract, nor was it intended or contemplated that they should have, any interest in the assets so delivered and pledged with this defendant by said Union Bank & Trust Company under the terms of said contract, other than that which they as such sureties [55] and guarantors would have under the law, to subrogation to the rights of this defendant in and to the assets so turned over and delivered to this defendant under the aforesaid contract, remaining uncollected and unreduced to cash on the 27th day of January, 1915, and then only to the extent of the moneys which they should be compelled to pay this defendant as such sureties and guarantors under the terms of the aforesaid contract, as the deficiency remaining unpaid to this defendant by the Union Bank & Trust Company, after the application of all proceeds derived from the assets so turned over to this defendant under said contract, less the expenses and costs of collection, incurred in connection with such collection and reduction to cash. That except as aforesaid, the said sureties and guarantors mentioned in said contract of January 27th, 1912, did not have and do not now have any interest in or to any of the said assets.

This defendant further states and alleges, that the assets so turned over and delivered to it under the terms and conditions of said agreement and contract, by said Union Bank & Trust Company, while having a face value in excess of the admitted liabilities of

the said Union Bank & Trust Company at the time said contract was entered into and executed, were in fact of considerably less value than such admitted liabilities, and they were known to the said Union Bank & Trust Company and to the directors thereof, including each and all of said sureties and guarantors, to be of considerably less value than the admitted liabilities which were to be paid by this defendant under the terms of the aforesaid contract; and it was because of this knowledge on the part of all of the parties to said contract and agreement, that this defendant insisted upon, [56] and the said Union Bank & Trust Company agreed to furnish, the further security for the repayment of this defendant, by the contracts of the sureties and guarantors mentioned and referred to in said contract of January 27th, 1912, and who did in fact execute and sign said contract as such sureties and guarantors for such purpose and security, as more fully shown by said exhibit "A" attached to the complaint herein.

This defendant further answering the allegations of said paragraph "IV" of said complaint herein, contained on pages 6 and 7 and lines 1 to 8 on page 8 of said complaint, specifically denies that it has any knowledge or information sufficient to form a belief as to the truth thereof, and hereby specifically denies the same. And this defendant further specifically denies that the said Union Bank & Trust Company ever received any of the assets and things referred to in exhibit "B" attached to said complaint, from the plaintiff herein, and further specifically denies that this defendant ever received any part of said assets and things.



5. This defendant denies each and every of the allegations contained in paragraph marked "VI" of said complaint herein, except as hereinafter admitted. And this defendant further alleges, that in the month of May, 1913, and after this defendant had expended a large amount of money and time in connection with its efforts to reduce to cash said assets so turned over and delivered to it by said Union Bank & Trust Company under the aforesaid contract of January 27th, 1912, and after this defendant had from time to time rendered to said Union Bank & Trust Company at its requests, statements and accounts relative to the amount of moneys expended by [57] this defendant in behalf of said Union Bank & Trust Company, under the terms of the aforesaid contract, there was had an adjustment and statement of such account existing between the said Union Bank & Trust Company and this defendant in connection with the aforesaid contract of January 27th, 1912, at which adjustment and statement, it was found by both of the defendants hereto and the sureties and guarantors on said contract, that there still remained unpaid and owing to this defendant from the said Union Bank & Trust Company on account of such expenditures in its behalf by this defendant, after deducting all moneys collected theretofore by this defendant, the sum of \$164,432.46; and thereafter the said Union Bank & Trust Company carried this amount on its books, as the amount of the indebtedness to this defendant at the date of such adjustment and settlement, in the place and stead of the larger amount shown by its books theretofore;

and at the time of such adjustment or shortly thereafter, the note of the said Union Bank & Trust Company in the sum of \$164,432.46 payable and due on the 27th day of January, 1915, was given and delivered to this defendant by the said Union Bank & Trust Company, for the purpose and under the circumstances hereinafter more particularly stated and set forth.

This defendant further states and alleges, that at the time said note was so given and received by this defendant, said note was not and was never intended to, in any way or manner place this defendant in any better position than it was and had been prior to the execution and delivery of said note; and said note was not of any value to this defendant and was not intended to be of any value to this defendant, other than as evidence of the adjustment and settlement of all disputes to that date relative to the exact amount then due to this defendant [58] from the said Union Bank & Trust Company under said contract of January 27th, 1912.

This defendant further alleges and shows, that the aforesaid note was executed and delivered by said Union Bank & Trust Company, primarily for the purpose of complying with the demand and request of the bank comptroller of the State of Arizona, who objected to the manner and method in which the indebtedness owing to this defendant from the said Union Bank & Trust Company, under said contract, was carried on the books of the said Union Bank & Trust Company, and who stated that it was the duty of the Union Bank & Trust Company to indicate



on its books that such indebtedness to this defendant, under said contract of January 27th, 1912, was an absolute indebtedness on the part of this defendant, and should be determined and fixed and placed in the form of a written obligation preferably in the form of a note definitely fixing the amount of the obligation to this defendant; that pursuant to such request, said adjustment and settlement of account was had between the defendants hereto, whereby all of the parties to said contract of January 27th, 1912, determined and fixed and agreed upon said sum of \$164,432.46 as the amount of the indebtedness existing on the part of the Union Bank & Trust Company to this defendant, and the aforesaid note was then executed and delivered to this defendant as aforesaid, as evidence of the agreed amount of such indebtedness, and was so received by this defendant for such purpose and none other; that no change or modification of the relationship, rights or liabilities of the parties to said contract of January 27th, 1912, was in fact made, or intended to be made, by the execution and delivery of said note.

[59]

This defendant further states that said note is still held in the possession of this defendant, but that the same is and always has been of no value or consequence to this defendant, other than as evidence of the amount so found and determined to be due as aforesaid; and this defendant is willing and has been willing since the making and executing of the contract of December 30, 1913, hereinafter referred to, that said note be returned to said Union

Bank & Trust Company, or to this court, for such action in reference thereto as it may deem proper and expedient.

6. This defendant denies each and every allegation contained in paragraph marked "VII" of said complaint, except as hereinafter admitted; and this defendant further answering said allegations so contained in paragraph marked "VII" in said complaint,

Admits that on the the 30th day of December, 1913, the said Union Bank & Trust Company and this defendant entered into that certain contract, a copy of which is annexed to the complaint herein and marked exhibit "I"; that said contract was entered into because of and in view of the then existing indebtedness on the part of the said Union Bank & Trust Company to this defendant, and for the reasons specifically set forth and referred to in said contract, to which contract of December 30th, 1913, hereby refers and hereby makes the same a part of this its answer; that said contract was not entered into for any reason other than those specifically set forth in said contract, the existence of which reasons and the facts therein stated, this defendant specifically alleges to be true.

This defendant further alleges and states that at the [60] time of the execution of said contract of December 30th, 1913, the value of the assets theretofore turned over and delivered to it under the terms of the said contract of January 27th, 1912, and not theretofore reduced to cash, was considerably less than the amount of the indebtedness then exist-



ing on the part of the Union Bank & Trust Company to this defendant, and that such deficiency conservatively estimated aggregated the sum of \$75,000; that the value of the assets transferred to this defendant under the terms of the said contract of December 30th, 1913, was and is considerably less than said remaining unpaid indebtedness, and unless this defendant shall hereafter succeed in recovering from the sureties and guarantors mentioned in said contracts of January 27th, 1912, and December 30, 1913, the deficiency which now remains due and unpaid and owing, after applying all moneys collected by this defendant, on account of the moneys expended by this defendant in discharge of the admitted liabilities of the said Union Bank & Trust Company, aforesaid, and after applying all of the still remaining assets at present in the hands of this defendant, at a reasonable valuation, this defendant will still be the loser in a large sum of money, aggregating as this defendant conservatively estimates, the sum of at least \$30,000. That notwithstanding the situation as stated and set forth hereinabove, the said Union Bank & Trust Company and its stockholders are by virtue of the aforesaid contract of December 30th, 1913, released and relieved from any liability for such deficiency.

This defendant further states and alleges to this Court that since the amending of the complainant's bill herein, the term of the contract of January 27th, 1912, aforesaid, has expired, and under the terms thereof this defendant is entitled to be paid and reimbursed the deficiency remaining unpaid and [61]

collected by this defendant, after applying all moneys collected by this defendant on account of the moneys expended by this defendant on behalf of said Union Bank & Trust Company under the terms of the said contract of January 27th, 1912, which said deficiency was, on the said 27th day of January, 1915, at least the sum of \$79,774.97; that the assets and properties turned *over this* defendant by said Union Bank & Trust Company and still remaining in its hands unreduced to cash aggregate in value a sum considerably less than the aforesaid deficiency now due to this defendant from the said guarantors and sureties under the terms of said contract of January 27th, 1912.

And this defendant further alleges and respectfully calls to the attention of this Court, that the complainant herein attempts to allege and show to this Court, that under and by virtue of the contract of December 30th, 1913, there were transferred and turned over to this defendant each and all of the property, assets and things set forth in Exhibits 1, 2, 3, 4, 5, 6, 7, 8, and 9, attached to the complaint herein, when in truth and in fact the greater portion of said assets and things so mentioned and referred to in said exhibits were in fact turned over and delivered to this defendant under the contract of January 27th 1912 including all of the office furniture and equipment of the banking institution of said Union Bank & Trust Company, although no formal bill or sale therefor was executed to this defendant until some time later; and that only a portion of the assets referred to in said exhibits 2 to 9 inclusive were



in fact turned over to this defendant under the contract of December 30th, 1913.

And this defendant further specifically denies that [62] this defendant ever did receive any of the assets or things which the plaintiff alleges and states it delivered to the said defendant the Union Bank & Trust Company in return for preferred stock alleged to have been purchased by the plaintiff from the said Union Bank & Trust Company, and specifically denies that it received any of the assets or things which the plaintiff alleges it delivered or transferred to the said Union Bank & Trust Company for any purpose or by reason of or in connection with any transaction heretofore had between the said plaintiff and the said Union Bank & Trust Company.

7. This defendant denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph marked "VIII" in said complaint and therefore hereby denies the same.

8. Denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph marked "IX" in said complaint, and therefore denies the same. And this defendant further states and shows to this Court that the books and records of the said defendant the Union Bank & Trust Company show that the said plaintiff herein is the record owner of 251 shares of the common stock of said Union Bank & Trust Company, which said 251 shares of said common stock constitute a majority of the outstanding and

issued common stock of the said Union Bank & Trust Company, at the time this action was commenced, and said record further shows that the plaintiff herein was at the time of the commencement of this action, and was for some time prior thereto, the owner of said shares and of a majority of the outstanding stock of said defendant the Union Bank & Trust Company, and could have voted [63] said majority shares of said capital stock at the meetings of the stockholders of said Union Bank & Trust Company held subsequent to the making of the contract of December 30th, 1913; that for some time prior to the commencement of this action and subsequent to the making of the contract of December 30th, 1913, aforesaid, the said plaintiff herein, through its officers and representatives, claimed the ownership of said 251 shares of the capital stock of said Union Bank & Trust Company and asserted the right to exercise and enjoy the powers and rights incident to such ownership.

9. Denies the allegations contained in paragraph marked "X" in said complaint herein.

WHEREFORE This defendant having fully answered said amended complaint herein, prays the judgment of this Court that said plaintiff herein take nothing by its action herein; that this defendant go hence with its costs and disbursements herein incurred, and that it have such other and further relief, judgment and orders herein, as in the judgment of this Court may be proper, just and equitable.

C. F. AINSWORTH,

Attorney and Solicitor for the Defendant The Valley Bank of Phoenix. [64]



[Endorsements]: No. E—20 (Phx.) District Court of the U. S. District of Arizona, at Phoenix, Arizona. Western Underwriting & Mortgage Co. vs. Valley Bank of Phoenix, and Union Bank & Trust Company, Defendants. Answer of Valley Bank of Phoenix to Amended Complaint. C. F. Ainsworth, Atty. and Solicitor for Valley Bank of Phoenix. Service of Copy of within Answer to Amended Complaint admitted this 23d day of Feby., 1915. George J. Stoneman, Atty. for Complainant. Filed Feb. 23, 1915, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [65]

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*In the District Court of the United States in and for  
the District of the State of Arizona.*

No. E-20.

WESTERN UNDERWRITING & MORTGAGE  
COMPANY, a Corporation, Organized and  
Existing Under the Laws of the State of  
California,

Complainant,

THE VALLEY BANK OF PHOENIX, a Corpo-  
ration, and THE UNION BANK & TRUST  
COMPANY, a Corporation, Both Organized,  
Existing and Doing Business Under the Laws  
of the State of Arizona,

Defendants.

**Motion to Strike.**

Comes now Western Underwriting and Mortgage Company, a corporation, complainant above named, by George J. Stoneman, E. J. Henning and Reese H. Ling, its solicitors, and moves to strike from the amended answer filed by Valley Bank of Phoenix one of defendants above named to the amended bill of complaint, all that portion of said amended answer as follows, to wit:

1. All that portion of said amended answer commencing with the word "that simultaneously" in folio 18, page 2, to and including folio 31 on said page, and folios 1 to 32 on page 3; 1 to 32 on page 4 and 1 to and including the words "January 27th, 1912" in folio 12 of page 5;

2. All of folio 21 to 31 inclusive on page 7; folios 1 to 31 inclusive on page 8 and folios 1 to and including the words "and none other" folio 27 on page 9;

3. The words "other than as evidence of the amount so found and determined to be due as aforesaid" in folios 4 and 5, [66] page 10.

4. All of the words commencing with the words "that said contract," folio 21, and ending with the word "true" folio 29, page 10;

5. All of the words in folios 27 to 31 inclusive on page 11 and folios 1 to 11 inclusive on page 12;

This motion is based upon the following grounds, to wit:

That the allegations in said portion of said amended answer so contained and above designated



are not sufficient in law to constitute a defense to this action in this, to wit:

That it is attempted by said defendant to plead a parol contract and to rely upon the terms of a parol contract for the purpose of altering the terms of the written contract, admitted by said defendant to exist;

That the alleged facts attempted to be pleaded are without sufficient or any allegation of any new or other consideration than the consideration set forth in the written contract of January 27th, 1912, admitted by defendant to have been executed and if permitted to be pleaded and relied upon as a defense by defendant will make entirely ineffective the terms of the admitted written contract of January 27th, 1912, in that it is admitted by said defendant to rest its defense in this action upon the existence and terms of an admitted written contract and in so far as complainant is concerned also upon the terms of a secret and undisclosed parol contract, alleged to have been entered into without sufficient or any consideration, for the purpose of changing, altering or modifying the terms of the admitted written contract, for all of which reasons and for other and further grounds of this motion, [67] complainant respectfully submits that no evidence under the terms of said alleged parol contract pleaded in said defendant's amended answer may be admitted.

GEORGE J. STONEMAN,

E. J. HENNING,

REESE M. LING,

Attorneys and Solicitors for Western Underwriting  
and Mortgage Company.

Dated this twenty-second day of March, 1915.

Service of copy of attached notice and above motion accepted this twenty-second day of March, 1915.

C. F. AINSWORTH,  
Solicitor for Valley Bank of Phoenix. [68]

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*In the District Court of the United States in and for  
the District of the State of Arizona.*

No. E-20.

WESTERN UNDERWRITING & MORTGAGE  
COMPANY, a Corporation, Organized and  
Existing Under the Laws of the State of  
California,

Complainant,

vs.

THE VALLEY BANK OF PHOENIX, a Corpora-  
tion, and THE UNION BANK & TRUST  
COMPANY, a Corporation, Both Organized,  
Existing and Doing Business Under the Laws  
of the State of Arizona,

Defendants.

**Notice [of Motion to Strike].**

To the Valley Bank of Phoenix, and Mr. C. F. Ainsworth, Its Attorney and Solicitor:

You, and each of you are hereby notified that on Monday, the 5th day of April, 1915, at the hour of 10 o'clock A. M., or as soon thereafter as counsel may be heard, Western Underwriting and Mortgage Company, complainant, above named, will submit to the above-entitled court, for its determination, a motion to strike certain portions of the amended



answer to complainant's amended bill, as designated in the motion filed in the above-entitled court, a copy of which is annexed hereto for your information.

GEORGE J. STONEMAN,

E. J. HENNING,

REESE M. LING,

Attorneys and Solicitors for Western Underwriting  
& Mortgage Company.

Dated this twenty-second day of March, 1915.

[69]

[Endorsements]: No. E—20. In the District Court of the United States in and for the District of the State of Arizona. Western Underwriting & Mortgage Company, a Corporation, Organized and Existing under the Laws of the State of California, Complainant, vs. the Valley Bank of Phoenix, a Corporation, and the Union Bank & Trust Company, a Corporation, both Organized, Existing and Doing Business under the Laws of the State of Arizona, Defendants. Motion to Strike. Filed Mar. 23, 1915. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. Law Offices, Stoneman & Ling, 405, 406 and 407 Goodrich Block, Phoenix, Arizona. [70]

*In the United States District Court for the District  
of Arizona.*

Minute Entry Appearing Under Date of Wednesday,  
April 14, 1915, at Phoenix, Arizona.

No. E—20.

WESTERN UNDERWRITING & MORTGAGE  
CO.,

Plaintiff,

vs.

VALLEY BANK OF PHOENIX,

Defendant.

**Minutes, April 14, 1915, Rehearing.**

This cause came on for hearing this day before the Court sitting without a jury, the plaintiff being represented by George J. Stoneman, Esquire, and E. J. Henning, Esquire, its attorneys and the defendant, the Valley Bank of Phoenix, appearing by C. F. Ainsworth, Esquire, and E. J. Bennett, Esquire, its attorneys. The plaintiff to maintain upon its part the issue herein, calls S. H. Stewart as a witness upon behalf of the plaintiff, who is sworn, examined and cross-examined. G. G. Smith is called as a witness upon behalf of the plaintiff, sworn, examined and cross-examined. Plaintiff's Exhibit "A," offered in evidence, is admitted as to the note and same is read into the record but not filed and admitted as to the certificate of stock, read into the record but not filed. Plaintiff's Exhibit "B" is admitted in evidence, and read into the record but not



filed. Plaintiff's Exhibit "C" offered in evidence, is excluded and not filed. Joseph S. Jenckes, and E. J. Henning are called as witnesses upon behalf of the plaintiff, sworn, examined and cross-examined. Thereupon, the plaintiff, having reserved the right to introduce certain books and papers in evidence on its behalf upon the arrival of same from California, rests its case.

Thereupon, the defendant by counsel moves the Court to dismiss this cause for the reason that the plaintiff has failed to make out a case on the pleadings and evidence adduced, [71] which motion is resisted by the plaintiff, is argued by counsel and submitted to the Court and, upon consideration thereof by the Court, said motion is sustained by the Court; **AND IT IS ORDERED** that the case be dismissed and that judgment be entered in favor of the defendants, to which ruling and action of the Court, the plaintiff, by counsel, excepts and gives notice of appeal to the Circuit Court of Appeals of the United States for the 9th Circuit from the order sustaining the said motion to dismiss and order of judgment to be entered in favor of the defendants. [72]

*In the United States District Court for the District  
of Arizona.*

Minute Entry Appearing Under Date of Tuesday,  
April 13th, 1915, at Phoenix, Arizona.

No. E—20.

WESTERN UNDERWRITING & MORTGAGE  
CO.,

Plaintiff,

vs.

VALLEY BANK OF PHOENIX et al.,  
Defendants.

**Order Denying Motion to Strike, etc.**

The motion of the plaintiff to strike from the defendants' answer certain portions thereof having been argued by counsel on yesterday and submitted to the Court for its decision thereon, upon consideration thereof by the Court, IT IS ORDERED that the said motion be and the same is hereby denied to which ruling and action of the Court the plaintiff by counsel excepts.

AND IT IS ORDERED that this case be set down for hearing on April 14, 1915, at the hour of 9:30 o'clock, A. M. [73]



**Judgment.**

*In the District Court of the United States, District  
of Arizona, at Phoenix, Arizona.*

No. E—20.

**WESTERN UNDERWRITING & MORTGAGE  
COMPANY**, a Corporation Organized and  
Existing Under the Laws of the State of Cali-  
fornia,

Complainant,

vs.

**THE VALLEY BANK OF PHOENIX**, a Corpo-  
ration, and **THE UNION BANK & TRUST  
COMPANY**, a Corporation, Both Organized  
and Existing and Doing Business Under the  
Laws of the State of Arizona,

Defendants,

The above-entitled action coming on fully to be  
tried before the above Court, the Hon. William H.  
Sawtelle, presiding without a jury, on the 14th day  
of April, 1915, the complainant appearing by George  
J. Stoneman, Esq., attorney and solicitor, and E. J.  
Henning, Esq., attorney and solicitor; and the de-  
fendant The Valley Bank of Phoenix, appearing by  
C. F. Ainsworth, Esq., its attorney and solicitor,  
and the defendant The Union Bank & Trust Com-  
pany appearing by Struckmeyer & Jenckes, Esqs., its  
attorneys and solicitors;

And the said plaintiff having duly submitted to  
this court its evidence and testimony in support of

the allegations of its complaint herein, and having duly rested its case,

And the defendant The Valley Bank of Phoenix having by its attorney and solicitor duly moved this Court for the dismissal of the said action, for the reason that the said plaintiff herein had failed to establish the allegations of said complaint herein, and that the evidence and testimony submitted by said plaintiff was not sufficient to sustain the allegations of its complaint nor to entitle it to any relief as against the said defendant, The Valley Bank of Phoenix, [74]

And it appearing to the satisfaction of this Court that the evidence and testimony submitted by the plaintiff was not sufficient to support the allegations of its complaint nor to entitle it to any relief as against the defendant The Valley Bank of Phoenix, and that the motion to dismiss made by said defendant The Valley Bank of Phoenix, should be granted,

NOW, THEREFORE, IT IS BY THE COURT CONSIDERED, ORDERED AND ADJUDGED, that the complaint herein, be and the same is hereby dismissed, and that the plaintiff take nothing by its said action;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant the Valley Bank of Phoenix, have and recover of and from the plaintiff the Western Underwriting & Mortgage Company its costs and disbursements herein, hereby taxed and allowed in the sum of \$81.00, and that said defendant have execution therefor.

Dated this 14th day of April, 1915.

WM. H. SAWTELLE,  
Judge of the District Court of the United States, in  
and for the District of Arizona.

[Endorsements]: District Court of the United States, District of Arizona, at Phoenix, Arizona. No. E—20. Western Underwriting & Mortgage Company, Plff., vs. The Valley Bank of Phoenix and The Union Bank & Trust Company, Defts. Judgment to Dismiss Action and for Costs in Favor of Defendant, The Valley Bank of Phoenix. C. F. Ainsworth, Attorney for Deft., Valley Bank of Phoenix, Phoenix, Arizona. Filed April 20, 1915. George W. Lewis, Clerk. [75]

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**[Order Granting Motion to Vacate Notice of Appeal.]**

*In the United States District Court for the District of Arizona.*

Minute Entry Appearing Under Date of September 20th, 1915, at Phoenix, Arizona.

WESTERN UNDERWRITING & MORTGAGE  
CO.,

Plaintiff,

vs.

THE VALLEY BANK OF PHOENIX et al.,  
Defendants.

And now comes George J. Stoneman, Esquire, Solicitor for the Western Underwriting & Mortgage Company, and moves that the notice of appeal to the



Circuit Court of Appeals for the Ninth Circuit, from the order granting the motion to dismiss plaintiff's bill of complaint and from the judgment and decree entered thereon, be vacated for the purpose of permitted the filing of a petition for allowance of appeal, accompanied by assignment of errors, which motion to vacate is by the Court this day granted. [76]

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*In the United States District Court for the District  
of Arizona.*

WESTERN UNDERWRITING & MORTGAGE  
COMPANY, a Corporation Organized and  
Existing Under the Laws of the State of Cali-  
fornia,

Complainant,

vs.

THE VALLEY BANK OF PHOENIX, a Corpo-  
ration, and THE UNION BANK & TRUST  
COMPANY, a Corporation, Both Organized,  
Existing and Doing Business Under the Laws  
of the State of Arizona,

Defendants,

**Petition for Appeal from the Order Dated April 14th,  
1915, in the District Court of the United States,  
for the District of Arizona.**

To the Honorable WILLIAM H. SAWTELL,  
Judge of the District Court of the United  
States, for the District of Arizona:

The above-named complainant feeling itself ag-  
grieved by the decree made and entered in this cause

on the 14th day of April, 1915, does hereby appeal from said decree to the Circuit Court of Appeals, for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and it praps that its appeal be allowed, and that a citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit, sitting at San Francisco;

That your petitioner further prays that the proper order touching the security to be required of it [77] to perfect its appeal be made.

GEORGE J. STONEMAN.

E. J. HENNING.

REESE M. LING.

C. A. McGEE.

A. J. MORGANSTERN.

E. E. HENDEE.

**[Order Granting Petition and Allowing Appeal.]**

The above petition is granted and the appeal allowed upon giving bond conditioned as required by law, in the sum of Five Hundred Dollars.

WM. H. SAWTELLE,

Judge.

Dated at Tucson, Arizona, October 2, 1915.

[Endorsements]: No. E-20. In the United States District Court, for the District of Arizona. Western Underwriting & Mortgage Company, a Corporation, Complainant, vs. The Valley Bank of Phoenix, a Corporation, et al., Defendants. Petition for Appeal from the Order dated April 14, 1915, in the Dis-

trict Court of the United States, for the District of Arizona. George J. Stoneman, Atty. for Complainant, 407 Goodrich Bldg., Phoenix, Arizona. Filed Sept. 20, 1915. George W. Lewis, Clerk. [78]

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*In the United States District Court, for the District of Arizona.*

WESTERN UNDERWRITING & MORTGAGE COMPANY, a Corporation Organized and Existing Under the Laws of the State of California,

Complainant,

vs.

THE VALLEY BANK OF PHOENIX, a Corporation, and THE UNION BANK & TRUST COMPANY, a Corporation, Both Organized, Existing and Doing Business Under the Laws of the State of Arizona,

Defendants.

**Stipulation [as to Abstract of Evidence].**

IT IS HEREBY STIPULATED, that the abstract of the evidence attached to and made a part of the assignment of errors filed in the above-entitled cause in the above-entitled court on September 20th, 1915, is, with the corrections and additions on the pages hereto attached, a full, true and correct abstract of all of the evidence submitted in said cause, and consent is hereby given to substitute originals of the pages showing corrections and additions hereto attached, for corresponding pages in



the original assignment of errors so filed.

C. F. AINSWORTH,

Solicitor for Valley Bank of Phoenix.

GEORGE J. STONEMAN,

Of Counsel for Western Underwriting & Mortgage Company.

Dated at Phoenix, Arizona, September 22d, 1915.

[79]

it to this note?     A. Yes, sir.

(By Mr. AINSWORTH.)

The WITNESS.—Since last August, 1914, I have been secretary and manager of the Underwriting Company. I was not connected with this company in 1913. My knowledge of this transaction is not necessarily based on what the company told me. I attended several meetings and also directors' meetings in 1913. I was not present at the time this note was given. I was at a conference afterwards; the matter was talked over. My knowledge is not derived altogether from something told me afterwards. After the note was executed, I was told what happened. I based my evidence from the records of the corporation.

By Mr. AINSWORTH.—Then we object to it, as the records are the best evidence.

By Mr. STONEMAN.—Q. Did you have any talks with Mr. Tenant himself?

A. Yes, sir, and every member of the board that was present when it was made. I talked just prior to March 5th, 1913, when this suit was filed, and just prior to the time this note was given, and afterwards I talked with Mr. Tennant himself. Tennant merely

settled the suit with the Underwriting Company, which the Underwriting Company brought against him for Sixty-five Thousand (\$65,000.00) Dollars. I was present at a couple of conferences before the settlement. I saw the pleading in the suit. I knew the suit was filed and I was in Los Angeles when it was filed.

By Mr. AINSWORTH.—We object to what Mr. Tennant said about it after the suit was filed. It is hearsay; it is simply a statement of past transactions and hearsay.

By the COURT.—I will admit it subject to the objection of defendant. I may exclude it later on.

By the WITNESS.—He spoke regarding this stock several [80\*—23†]

time he told me he was going to sell it and make a nice profit for himself and the company was a fool to let him have it. The Western Underwriting Company has never considered the stock as theirs. The collateral was not sold because we would have to have a judgment before we could sell it.

By the COURT.—When did you file your suit?

A. Mr. Henning could tell you more about that than I can.

By Mr. HENNING.—The answer was made October 14. I might say to Mr. Ainsworth that I have here a correct copy of the answer, and would be very glad to let him have it, and very glad to have it offered in evidence.

By Mr. AINSWORTH.—Did you say you have

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\*Page-number appearing at foot of page of original certified Record.

†Original page-number of Stipulation as to Abstract of Evidence as same appears in Original Certified Transcript of Record.

not exercised any rights of ownership since the note was given?

A. Well, there never has been any acts in the minutes regarding this at all, and none since I have been in the office since August, 1914. This note was given in September, 1913. The minutes would show whether they exercised any rights of ownership prior to the time I went in.

Q. Then you do not know of your own knowledge whether they tried to sell it or anything like that?

A. They could not sell it.

Q. Why not—because it did not stand in their name?

A. Why, I could not sell a horse just because it was in my barn.

Q. Didn't they endorse it?

A. Yes, sir. [81—26]

the matter in your Honor's own judgment, and shall be satisfied with your judgment.

By the COURT.—I do not like to rule at this time that I think the evidence is sufficient, but while I realize the embarrassment that comes to a lawyer when he is called upon to testify, the exigencies of the case seem to require it, and it is entirely proper for him to do so.

Mr. STONEMAN.—We thank your Honor for the consideration and I will call Mr. Henning.

E. J. HENNING was called as a witness on behalf of plaintiff, and being first duly sworn, testified as follows:

I and my firm have been for some time past counsel for Western Underwriting & Mortgage Company, a corporation in San Diego. I am acquainted with



J. K. Tennant, and also with Judge Trask, of Los Angeles, who is now dead. Judge Trask at the time I knew him at different times was attorney for J. K. Tennant. Based upon statements made to me, Tennant would have refused to vote any stock or vote this stock, had he been requested as a stockholder to bring this action.

By Mr. AINSWORTH.—Objected to as hearsay.

By the COURT.—Objection overruled.

Before the annual meeting of the Union Bank & Trust Company in January, 1914, Judge Trask was at that time counsel for and representing Mr. Tennant in this matter. Just prior to that he appeared for Tennant in the suit we brought against Tennant, which, however, had been settled, Judge Trask represented Tennant in the settlement, which resulted in this forty thousand dollar note to which the stock certificate is attached. Judge Trask called me on the 'phone and stated the Western Underwriting & Mortgage Company had failed to carry out its agreement with him and Mr. Tennant; that this stock certificate for 251 shares of Union Bank & Trust Company was to be transferred on the [82—32]

upon all of its stockholders? Had they not the right to construe that contract as it was intended to be, as it was, or as they expected it to be? I am referring to the written contract of December 30th, 1913, which treats the contract of January 27th, 1912, as a security for debt and not as an absolute sale as the instrument itself seems to make it.

By Mr. STONEMAN.—Yes?

By the COURT.—Now, then, upon that, and with-

out considering the question of whether contemporaneous with the contract of January 27th, 1913, there was a parol agreement between these parties, which they had the right, it seems to me, to recognize at the time they entered into the contract of December 30th, I say are you not bound by the construction which the corporation itself, for whom you sue, placed upon it?

By Mr. STONEMAN.—I do not believe so if it can be determined from the contracts that it was void for absolute want of consideration.

By the COURT.—Isn't that a defensive matter? You cannot presume there was a want of consideration, can you?

By Mr. STONEMAN.—Suppose, if your Honor please, that Mr. Henning told me that I owed him eight hundred sacks of grain, and under a misconception of the facts, I had paid him eight hundred sacks of grain and had turned them over to him, and it turned out afterwards that I didn't owe him but three hundred sacks of grain. Now, I certainly would have the right to sue Mr. Henning for that five hundred sacks. Now, if this board of directors, under the mistaken idea that they might construe the contract of January 27th so that an indebtedness was admitted to exist from the Union Bank to the Valley Bank of seventy-five or eight thousand dollars, executed a new contract, it would not mean that a stockholder was [83—40] bound by their mistake, providing that you could look to the contracts themselves and found that there could have existed no indebtedness. It is susceptible of only one con-



struction. I say that this contract is a sale on its face, and there is, in the answer, no transaction between the Valley Bank and the Union Bank which could have given rise, between January, 1912, and December, 1913, any indebtedness between the Union Bank and the Valley Bank. Their dealings ceased on January 27th, 1912. Now, if the Union Bank, then, we speaking for the Union Bank, cannot go to the Valley Bank and say to the Valley Bank, "You have taken from us \$75,000 worth of assets which you have not any right to take," or according to the testimony here, something like \$33,000 worth; "you had no right to take it; there was no consideration for it." We submit this contract for your consideration from which you can see that we do not owe it to you, and we want it back."

By the COURT.—And you admit that it did not exist?

By Mr. STONEMAN.—If your Honor please, are we bound because we have admitted something which could not exist?

By the COURT.—You have admitted it by your contract of December 30th, have you not?

By Mr. STONEMAN.—I suppose we have in so far as there was any authority to admit it; I am speaking as the Union Bank and not as the stockholder.

By the COURT.—Now, then, if that be true, if you have admitted it, how can you ask the Court to assume that there was no consideration for that admission?

By Mr. STONEMAN.—Because we have come into



court and shown the Court that there was a mistake and shown the Court that the consideration could not have existed with the [84—41] proof out of their own mouths. We think it is up to them to establish the validity of the parol contract, and when they attempt to do that, we submit the rule that they cannot introduce such evidence for the parol contract to qualify the terms of a written contract.

By the COURT.—Now, let us see. On December 30th, you say that you—I am reading from page 2 of exhibit one, you said that you were indebted—that you executed a note for \$164,000 on the 17th day of May, 1913, and that there remains due upon this note approximately \$75,000.00.

(Discussion.)

By the COURT.—It seems to me from the discussion that was had when the demurrers were argued, or rather the motion to strike was argued, the construction and the opinion that I got at that time, from the reading of the contract originally entered into, the one of January 27th, 1912, that it might well be construed as the parties afterwards did construe it, that is to mean a security for a debt. It is most unusual for a person who buys property, notes and securities outright, to take one as a guarantee for them guaranteeing the purchaser against loss, and it seems to me, if this case were to proceed, that the defendant would be allowed to introduce

[Endorsements]: No. E-20. In the United States District Court, for the District of Arizona. *Western Underwriting & Mortgage Co., Complainant, vs. The Valley Bank of Phoenix, a Corporation, et al.,*

Defendants. Stipulation. George J. Stoneman, Solicitor for Complainant, 407 Goodrich Bldg., Phoenix, Arizona. Filed Oct. 1, 1915, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [85—42]

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*In the District Court of the United States for the District of Arizona.*

WESTERN UNDERWRITING & MORTGAGE  
COMPANY, a Corporation,

Appellant,

vs.

THE VALLEY BANK OF PHOENIX, a Corporation,  
and THE UNION BANK & TRUST  
COMPANY, a Corporation,

Appellees.

**Praecipe for Transcript of Record.**

To the Clerk of the United States District Court in  
and for the District of Arizona:

You will please prepare a transcript of record in the above-entitled case, to be filed in the office of the clerk of the United States Circuit Court of Appeal for the Ninth Judicial District upon an appeal to be perfected to said Court in said case, including in such transcript the following proceedings, pleadings, papers, records and files, to wit:

1. Bill of complaint as amended by leave of Court during trial.

2. Second amended answer of defendant, The Valley Bank of Phoenix.

3. Process.

4. Return of service of process.
5. Motion to strike portions of amended answer referred to in said motion.
6. Stipulation admitting certain allegations of the bill of complaint.
7. Judgment and decree of the Court.
8. Minute entries.
  - (a) Showing leave to amend bill of complaint during trial.
  - (b) Ruling of Court denying motion to strike.
  - (c) Motion to dismiss bill of complaint. [86]
  - (d) Order of Court granting motion to dismiss bill of complaint.
  - (e) Exceptions- taken and allowed by complainant to denial of motion to strike and to order granting motion to dismiss bill of complaint.

~~This stipulation:~~

9. Assignment of errors.
10. Stipulation permitting amendment of assignment of errors.
11. Allowance of appeal.
12. Bond on appeal.
13. Certificate of clerk.

GEORGE J. STONEMAN,

Solicitor for Western Underwriting & Mortgage Company.

Dated at Phoenix, Arizona, October 4th, 1915.

[Endorsements]: No. E-20 (Phx.) In the District Court of the United States for the District of Arizona. Western Underwriting & Mortgage Com-



pany, a Corporation, Appellant, vs. The Valley Bank of Phoenix, a Corporation, and The Union Bank & Trust Company, a Corporation, Appellees. Praecipe for Transcript of Record. Filed Oct. 4, 1915, at —M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy.  
[87]

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*In the District Court of the United States for the  
District of Arizona.*

WESTERN UNDERWRITING & MORTGAGE  
COMPANY, a Corporation,

Appellant,

vs.

THE VALLEY BANK OF PHOENIX, a Corpora-  
tion, and THE UNION BANK & TRUST  
COMPANY, a Corporation,

Appellees.

**Bond.**

KNOW ALL MEN BY THESE PRESENTS:  
That we, Western Underwriting & Mortgage Com-  
pany, a corporation, as principal, and The United  
States Fidelity & Guarantee Company, a corpora-  
tion, duly registered in the above-entitled court and  
authorized to act in the capacity herein set forth as  
surety, acknowledge ourselves to be jointly indebted  
to The Valley Bank of Phoenix, a corporation, and  
The United Bank & Trust Company, a corporation,  
appellees in the above-entitled cause, in the sum of  
Five Hundred Dollars (\$500.00) conditioned that;

WHEREAS, on the 14th day of April, A. D. 1915,  
in the District Court of the United States for the

District of Arizona, in a suit pending in that court, wherein the Western Underwriting & Mortgage Company, a corporation, was plaintiff, and The Valley Bank of Phoenix and The Union Bank & Trust Company, both corporations, were defendants, numbered in equity docketed as No. E-20, a decree was rendered against the said Western Underwriting & Mortgage Company; and the said Western Underwriting & Mortgage Company, having been allowed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit and filed a copy thereof in the office of the clerk of the court to reverse the said decree and a citation directed to the said The Valley Bank of Phoenix and The Union Bank & [88] Trust Company, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the city of San Francisco, State of California, on the seventh of February, 1916, and at such further times and places as said Court may from time to time designate.

NOW, if the said Western Underwriting & Mortgage Company shall prosecute this appeal to effect and answer and pay all costs which have accrued and may accrue in the prosecution of this appeal, if it fail to make its plea good, then the above obligation to be void; otherwise, to remain in full force and virtue; and the said bond and obligation is upon the further express condition and agreement by the surety thereof that, in case of a breach of the conditions set forth herein, this Court may, upon notice to such surety, of not less than ten days, proceed

summarily in said action or suit in which this bond is given to ascertain the amount which said surety is bound to pay on account of said breach of said bond and undertaking and render judgment against the said surety and award execution thereon.

Dated this 30th day of October, 1915.

WESTERN UNDERWRITING & MORT-  
GAGE COMPANY,

By GEO. G. SMITH,  
Vice-president.

[Seal]                      Attest: F. W. ELLIOTT,  
Secretary.

UNITED STATES FIDELITY & GUAR-  
ANTY COMPANY,

[Seal]                      By C. W. OESTING,  
Attorney in Fact,  
Surety.

Approved as to form and sufficiency of the surety  
this —— day of October, 1915.

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Judge of the District Court of the United States,  
for the District of Arizona. [89]

State of California,  
County of San Diego,—ss.

On this thirtieth day of October, in the year of  
our Lord one thousand nine hundred and fifteen,  
before me, H. M. Ball, a notary public in and for  
said county and State, residing therein, duly commis-  
sioned and sworn, personally appeared C. W. Oest-  
ing, known to me to be the person whose name is  
subscribed to the within instrument, as the attorney  
in fact of the United States Fidelity & Guaranty



Company and acknowledged to me that he subscribed the name of the United States Fidelity & Guaranty Company thereto as surety, and his own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the county and State aforesaid, the day and year in this certificate first above written.

[Seal]

H. M. BALL,

Notary Public, in and for the Said County of San Diego, State of California.

Approved as to form and sufficiency of the surety this 1st day of November, 1915.

GEORGE W. LEWIS,

Clerk of the District Court of the United States, for the District of Arizona.

By R. E. L. Webb,

Deputy.

[Endorsements]: No. E-20 (Phx.). In the District Court of the United States for the District of Arizona. Western Underwriting & Mortgage Company, a Corporation, Appellant, vs. The Valley Bank of Phoenix, a Corporation, and The Union Bank & Trust Company, a Corporation, Appellees. Bond. Filed Nov. 1, 1915, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [90]

**[Certificate of Clerk U. S. District Court of  
Transcript of Record.]**

*In the United States District Court for the District  
of Arizona.*

No. E-20 (PHOENIX).

WESTERN UNDERWRITING & MORTGAGE  
COMPANY (a Corporation),

Plaintiff,

vs.

THE VALLEY BANK OF PHOENIX (a Corpora-  
tion), and THE UNION BANK & TRUST  
COMPANY (a Corporation),

Defendants.

United States of America,  
District of Arizona,—ss.

I, George W. Lewis, clerk of the United States District Court for the District of Arizona, do hereby certify that the foregoing ninety (90) typewritten pages, numbered from one (1) to ninety (90), inclusive, constitute a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause, as *as* is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on appeal from the judgment of said United States District Court for the District of Arizona, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf [91] of the plaintiff for the preparation and certification of the typewritten transcript of record issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fee (Sec. 828 R. S. U. S., as amended by Sec. 6, Act of March 2, 1905), for mak- ing typewritten transcript of record, 258 folios at 20¢ per folio.....	\$51.60
Certificate of Clerk to typewritten transcript of record, 3 folios at 30¢ per folio.....	.90
Seal to said certificate.....	.40
	<hr/>
	\$52.90

I hereby certify that the above cost for preparing and certifying the record, amounting to \$52.90, has been paid to me by George J. Stoneman, Esquire, attorney for the plaintiff.

I further certify that I hereto attach and herewith transmit the original assignment of errors and citation issued in the cause.

IN WITNESS WHEREOF, I have hereto set my hand and affixed the Seal of said District Court at Phoenix, in said District, this 2d day of November, A. D. 1915.

[Seal]

GEORGE W. LEWIS,  
Clerk.

R. E. L. Webb,  
Deputy. [92]



*In the District Court of the United States for the  
District of Arizona.*

WESTERN UNDERWRITING & MORTGAGE  
COMPANY (a Corporation),  
Appellant,

vs.

THE VALLEY BANK OF PHOENIX (a Corpora-  
tion), and THE UNION BANK & TRUST  
COMPANY (a Corporation),  
Appellees.

**Citation.**

United States of America to The Valley Bank of  
Phoenix, a Corporation, and The Union Bank &  
Trust Company, a Corporation, the Defendants,  
Greeting:

You are hereby notified that, in a certain case of  
equity in the United States District Court in and  
for the District of Arizona, wherein Western Under-  
writing & Mortgage Company, a corporation, is  
plaintiff, and The Valley Bank of Phoenix, a cor-  
poration, and The Union Bank & Trust Company, a  
corporation, are defendants, an appeal has been al-  
lowed the plaintiff therein to the United States Cir-  
cuit Court of Appeals, Ninth Circuit. You are hereby  
cited and admonished to be and appear in said court,  
at the city of San Francisco, State of California,  
thirty days after the date of this citation, to show  
cause, if any there be, why the order and decree ap-  
pealed from should not be corrected and speedy jus-  
tice done the parties in that behalf.

WITNESS, the Honorable WM. H. SAWTELLE,  
Judge of the United States District Court in and  
for the District of Arizona, this 4th day of October,  
1915.

WM. H. SAWTELLE,  
Judge of the United States District Court for the  
District of Arizona.

Service of above citation admitted October 12th,  
1915.

STRUCKMEYER & JENCKES,  
Attorneys for Union Bank & Trust Co.

State of Arizona,  
County of Maricopa,—ss.

George J. Stoneman, being first duly sworn, says  
that on the 12th day of October, 1915, he delivered  
a copy of the within citation to E. J. Bennett, presi-  
dent of The Valley Bank of Phoenix, at Phoenix,  
Arizona.

GEORGE J. STONEMAN,

Subscribed and sworn to before me this 12th day  
of October, 1915.

[Seal] JOSEPH S. JENCKES,  
Notary Public in and for the County of Maricopa,  
State of Arizona.

My commission expires Feby. 16, 1916. [93]

[Endorsed]: No. E-20. In the District Court of  
the United States for the District of Arizona.  
Western Underwriting & Mortgage Company, a  
Corporation, Appellant, vs. The Valley Bank of  
Phoenix, a Corporation, and The Union Bank &  
Trust Company, a Corporation, Appellees. Citation

Filed Oct. 12, 1915, at — M. George W. Lewis,  
Clerk. By R. E. L. Webb, Deputy. [94]

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*In the United States District Court for the District  
of Arizona.*

WESTERN UNDERWRITING & MORTGAGE  
COMPANY, a Corporation Organized and  
Existing Under the Laws of the State of  
California,

Complainant,

vs.

THE VALLEY BANK OF PHOENIX, a Corpora-  
tion, and THE UNION BANK & TRUST  
COMPANY, a Corporation, Both Organ-  
ized, Existing and Doing Business Under  
the Laws of the State of Arizona,

Defendants.

**Assignment of Errors.**

AND NOW, on this 18th day of September, 1915,  
during the regular April, 1915, term of the above-  
entitled court, sitting at Phoenix in the District of  
Arizona, comes complainant above named, by its  
solicitors, George J. Stoneman, Reese M. Ling, E. J.  
Henning, C. A. A. McGee, A. J. Morganstern and E.  
E. Hendee, and says, that the decree entered in the  
above-entitled cause on the 14th day of April, 1915,  
is erroneous and unjust to complainant,

**I.**

Because the Court erred in denying complainant's  
motion to strike from the amended answer filed by  
Valley Bank of Phoenix, one of defendants above



named, to the amended bill of complaint, all that portion of said amended answer as follows, to wit:  
[95\*—1†]

(1) All that portion of said amended answer commencing with the words “that simultaneously” in folio 22 (erroneously referred to in said motion as folio 18), page 2, to and including folio 31 on said page, and folios 1 to 32 on page 3; 1 to 32 on page 4 and 1 to and including the words “January 27th, 1912” in folio 18 (erroneously referred to in said motion as folio 12) of page 5; said portion being in words and figures as follows, to wit:

“that simultaneously with the execution of said contract, and as part of the same transaction, this defendant and the said Union Bank & Trust Company entered into a verbal contract and agreement, wherein and whereby it was agreed and understood, that the said Union Bank & Trust Company should have the right, upon payment to this defendant of all moneys expended by this defendant, under the terms of the aforesaid written contract (except such moneys as may have been repaid to it) to have all of the assets which were transferred to this defendant under the terms of the aforesaid written contract of January 27, 1912, (except such as may have been reduced to cash) returned to said Union Bank & Trust Company. And it was agreed that said written contract

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\*Page-number appearing at foot of page of original certified Record.

†Original page-number of Assignment of Errors as same appears in Original Certified Transcript of Record.

should not embody such verbal agreement aforesaid.

“And this defendant further alleges and shows that while the said contract mentioned in said complaint herein and attached thereto as exhibit ‘A’ provides that the said assets therein referred to shall be and are transferred to this defendant, absolutely, such transfer was made in that form in order to enable this defendant to more readily handle and collect such assets, in its own name.

“This defendant further shows and expressly alleges that the said Union Bank & Trust Company, and this defendant understood and agreed at the time such transfer of said assets was made to this defendant, that such transfer of said assets was simply in the nature of a pledge for the repayment to this defendant of the moneys which this defendant should advance and pay out under the terms of the aforesaid written contract, with the added privilege, however, of this defendant using and handling such assets in such manner as would reduce the same to cash as speedily as possible and advisable, and to apply the proceeds thereof towards the payment to this defendant of the moneys advanced and paid out by it under the terms of said written contract aforesaid.

“This defendant further shows and alleges, that in pursuance of the agreement and understanding hereinabove referred to, both this defendant and the said Union Bank & Trust Com-



pany, ever since the making of said contract of January 27th, 1912, and up and until [96—2] the making of the contract of December 30th, 1913, hereinafter referred to, treated and considered said assets so turned over to this defendant under the said contract of January 27th, 1912, as a pledge, and did also treat and consider the moneys so expended and paid out by this defendant under the terms of the said contract, as an indebtedness on the part of said Union Bank and Trust Company to this defendant, and did so carry said assets and said indebtedness on their respective account books, and said Union Bank & Trust Company did from time to time in its reports to the State Auditor of the State of Arizona, report said assets as being held by this defendant for it, but subject to this defendants claim thereto as security, and did report to said state auditor, as an indebtedness on its part to this defendant, the amount claimed by this defendant for moneys paid by it under said contract of January 27th, 1912, and not theretofore repaid to it.

“This defendant further alleges that said Contract of January 27th, 1912, did not contain and it was not intended it should contain, any release or discharge on the part of this defendant to the said Union Bank & Trust Company, for any deficiency which may remain after the application of the proceeds derived from the assets so turned over to it by said Union Bank & Trust Company under the aforesaid contract.



That each and all of the persons and individuals who signed and subscribed said contract, either as officers of said Union Bank & Trust Company, or as sureties and guarantors, were at the time of such signing said contract, directors of said Union Bank & Trust Company.

“That pursuant to the requirements and terms of said contract, this defendant did pay off and discharge each and all of the debts and liabilities of said Union Bank & Trust Company, as in said contract provided and referred to.

“This defendant further alleges and shows to this Court, that the persons mentioned and described in said complaint and contract, as the sureties for said Union Bank & Trust Company, were not given by the terms of said contract, nor was it intended or contemplated that they should have any interest in the assets so delivered and pledged with this defendant by said Union Bank & Trust Company under the terms of said contract, other than that which they as such sureties and guarantors would have under the law, to subrogation to the rights of this defendant in and to the assets so turned over and delivered to this defendant under the aforesaid contract, remaining uncollected and unreduced to cash on the 27th day of January.”

[97—3]

All of folios 7 (erroneously referred to in said motion as folio 21) to 31 inclusive on page 7; folios 1 to 31 inclusive on page 8 and folios 1 to and in-

cluding the words "and none other" folio 13 (erroneously referred to in said motion as folio 27) on page 9; said portion is in words and figures as follows, to wit:

"And this defendant further alleges, that in the month of May, 1913, and after this defendant had expended a large amount of money and time in connection with its efforts to reduce to cash the said assets so turned over and delivered to it by said Union Bank & Trust Company under the aforesaid contract of January 27th, 1912, and after this defendant had from time to time rendered to said Union Bank & Trust Company, at its requests, statements and accounts relative to the amount of moneys expended by this defendant in behalf of said Union Bank & Trust Company, under the terms of the aforesaid contract, and also of the amounts collected by this defendant on said assets aforesaid, there was had an adjustment and statement of such account existing between the said Union Bank & Trust Company and this defendant in connection with the aforesaid contract of January 27th, 1912, at which adjustment and settlement, it was found by both of the defendants hereto and the sureties and guarantors on said contract, that there still remained unpaid and owing to this defendant from the said Union Bank & Trust Company on account of such expenditures on its behalf by this defendant, after deducting all moneys collected theretofore by this defendant, the sum of

\$164,432.46; and thereafter the said Union Bank & Trust Company carried this amount on its books, as the amount of the indebtedness to this defendant at the date of such adjustment and settlement, in the place and stead of the larger amount shown by its books theretofore; and at the time of such adjustment or shortly thereafter, the note of the said Union Bank & Trust Company in the sum of \$164,432.46 payable and due on the 27th day of January, 1915, was given and delivered to this defendant by the said Union Bank & Trust Company, for the purpose and under the circumstances hereinafter more particularly stated and set forth.

“This defendant further states and alleges, that at the time said note was so given to and received by this defendant, said note was not and was never intended to, in any way or manner place this defendant in any better position than it was and had been prior to the execution and delivery of said note; and said note was not of any value to this defendant and was not intended to be of any value to this defendant, other than as evidence of the adjustment and settlement of all disputes to that date relative to the exact [98—4] amount then due to this defendant from the said Union Bank & Trust Company under said contract of January 27th, 1912.

“This defendant further alleges and shows, that the aforesaid note was executed and delivered by the said Union Bank & Trust Company,



primarily for the purpose of complying with the demand and request of the Bank Comptroller of the State of Arizona, who objected to the manner and method in which the indebtedness owing to this defendant from the said Union Bank & Trust Company, under said contract, was carried on the books of said Union Bank & Trust Company, and who stated that it was the duty of the Union Bank & Trust Company to indicate on its books that such indebtedness to this defendant, under said contract of January 27th, 1912, was an *absolute* on its part to this defendant, and should be determined and fixed and placed in the form of a written obligation, preferably in the form of a note definitely fixing the amount of the obligation to this defendant; that pursuant to such request, said adjustment and settlement of account was had between the defendants hereto, whereby all of the parties to said contract of January 27th, 1912, determined and fixed and agreed upon said sum of \$164,432.46 as the amount of the indebtedness existing on the part of the Union Bank & Trust Company to this defendant, and the aforesaid note was then executed and delivered to this defendant as aforesaid, as evidence of the agreed amount of such indebtedness, and was so received by this defendant for such purpose and none other;"

(3) The words "other than as evidence of the amount so found and determined to be due as aforesaid" in folios 21 and 22, page 9 (erroneously re-

ferred to in said motion as folios 4 and 5, page 10).

(4) All of the words commencing with the words "that said contract" folio 6 (erroneously referred to in said motion as folio 21) and ending with the word "true" folio 16 (erroneously referred to in said motion as folio 29), page 10; said portion is in words and figures as follows, to wit:

"that said contract was entered into because of and in view of the then existing indebtedness on the part of the said Union Bank & Trust Company to this defendant, and for the reasons specifically set forth and referred to in said contract, to which contract of December 30th, 1913, this defendant hereby refers and hereby makes the same a part of this its answer [99—5] that said contract was not entered into for any reasons other than those specifically set forth in said contract, the existence of which reasons and the facts therein stated, this defendant specifically alleges to be true."

This motion being based upon the following grounds, to wit:

That the allegations in said portion of said amended answer so contained and above designated are not sufficient in law to constitute a defense to this action in this, to wit:

That it is attempted by said defendant to plead a parol contract and to rely upon the terms of a parol contract for the purpose of altering the terms of the written contract, admitted by said defendant to exist;

That the alleged facts attempted to be pleaded



are without sufficient or any allegation of any new or other consideration than the consideration set forth in the written contract of January 27th, 1912, admitted by defendant to have been executed and if permitted to be pleaded and relied upon as a defense by defendant will make entirely ineffective the terms of an admitted written contract and in so far 27th, 1912, in that it is admitted by said defendant to rest its defense in this action upon the existence and terms of an admitted written contract and in so far as complainant is concerned also upon the terms of a secret and undisclosed parol contract, alleged to have been entered into without sufficient or any consideration, for the purpose of changing, altering or modifying the terms of the admitted written contract, for all of which reasons and for other and further grounds of this motion, complainant respectfully submits that no evidence under the terms of said alleged parol contract [100—6] pleaded in said defendant's amended answer may be admitted.

## II.

That the Court erred in granting the Motion of defendant, The Valley Bank of Phoenix, to dismiss the action and the bill of complaint of complainant, upon the grounds assigned in said motion, that complainant Western Underwriting & Mortgage Company had failed to show cause or to show that the officers of the Union Bank & Trust Company did not have the right to transfer the property described in the bill of complaint to the Valley Bank of Phoenix on December 31st, 1913, in this, to wit: That by the ruling of this Honorable Court so made dismissing



said bill of complaint, this Court necessarily predicated said ruling upon the assumed existence of a parol contract, alleged by defendant by way of affirmative defense, to have been executed contemporaneously with the written contract of January 27th, 1912, set forth in complainant's bill of complaint, and assumed as true the existence of this parol contract, without proof thereof by defendant that said contract of January 27th was not plain and unambiguous as to its terms, and without proof by said defendant of any new or other consideration for the making of said parol contract so by said defendant pleaded as a defense, and upon which said defendant relied.

### III.

That this Honorable Court further erred in the granting of the motion of The Valley Bank of Phoenix, one of the defendants above named, to dismiss complainant's bill of complaint, for the further reason, that without proof by said defendant of the existence of a parol contract based upon a new consideration, changing and modifying the contract of January 27th, 1912, as set forth in complainant's bill of [101—7] complaint, said defendant could not rely upon the contract of December 30th, 1913, as set forth in complainant's bill of complaint, and such ruling necessarily construed the contract of January 27th, 1912, to be a contract of pledge instead of a contract of sale.

### IV.

That the Court erred in making and entering its decree in favor of the defendants and against the

complainant. Said decree being in words and figures as follows, to wit:

“(Title of Court and Cause.)

The above-entitled cause coming on duly to be tried before the above Court, the Hon. William H. Sawtelle, presiding without a jury, on the 14th day of April, 1915, the complainant appearing by George J. Stoneman, Esq., Attorney and Solicitor, and E. J. Henning, Esq., Attorney and Solicitor; and the defendant The Valley Bank of Phoenix, appearing by C. F. Ainsworth, Esq., its Attorney and Solicitor; and the defendant The Union Bank & Trust Company appearing by Struckmeyer & Jenckes, Esqs., its Attorneys and Solicitors;

“And the said plaintiff having duly submitted to this Court its evidence and testimony in support of the allegations of its complaint herein, and having duly rested its case,

“And the defendant The Valley Bank of Phoenix having by its attorney and solicitor duly moved this Court for the dismissal of the said action, for the reason that the said plaintiff herein had failed to establish the allegations of said complaint herein, and that the evidence and testimony submitted by said plaintiff was not sufficient to sustain the allegations of its complaint nor to entitle it to any relief as against said defendant The Valley Bank of Phoenix.

“And it appearing to the satisfaction of this Court that the evidence and testimony submitted by the plaintiff was not sufficient to support the

allegations of its complaint nor to entitle it to any relief as against the defendant The Valley Bank of Phoenix, and that the motion to dismiss made by said defendant The Valley Bank of Phoenix, should be granted,

“NOW, THEREFORE, IT IS BY THE COURT CONSIDERED ORDERED AND ADJUDGED, that the complaint herein, be and the same is hereby dismissed, and that the plaintiff take nothing by its action; [102—8]

“IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant The Valley Bank of Phoenix, have and recover of and from the plaintiff The Western Underwriting & Mortgage Company, its costs and disbursements herein, hereby taxed and allowed in the sum of \$81.00, and that said defendant have execution therefor.

“Dated this 14th day of April, 1915.

(Signed) WM. H. SAWTELLE,  
Judge of the District Court of the United States,  
in and for the District of Arizona.”

To all of which rulings of the Court so made, complainant in open court and at the time of said rulings, duly entered exceptions; which exceptions were by the Court allowed.

**[Evidence, Testimony.]**

The evidence and testimony submitted by complainant, and upon which the ruling of the Court as above set forth was predicated in the above-entitled cause, which came on regularly to be heard in the above-entitled court before the Honorable William



H. Sawtelle, Judge thereof, in the city of Phoenix, Arizona, on the 14th day of April, A. D. 1915, complainant being represented by its attorneys and solicitors, George J. Stoneman and E. J. Henning, and defendant, The Valley Bank of Phoenix, being represented by C. F. Ainsworth, its attorney and solicitors, and the Union Bank & Trust Company by its attorneys and solicitors, Messrs. F. C. Struckmeyer and Joseph S. Jenckes, was as follows, to wit:

**[Testimony of Sidney H. Stewart, for Complainant.]**

SIDNEY H. STEWART, being called as a witness on behalf of complainant, testified as follows:

Direct Examination.

(By Mr. STONEMAN.)

The WITNESS.—I have not the original of a receipt dated December 31st, 1913, in the following words: “Received of Union Bank & Trust Company the following items transferred [103—9] to us under and by virtue of that certain contract and agreement bearing date the 30th of December, 1913, followed by a list of assets received, signed by Valley Bank of Phoenix by S. H. Stewart, Assistant Cashier. The original is in possession of the officers of the Union Bank & Trust Company.

I have read exhibit 10 attached to the original complaint. The Valley Bank at this time has some of those assets listed in exhibit 10. It has in its possession Road District Improvement Bonds of San Diego, aggregating \$7,123.50. Richard Allen note \$261.00. J. R. Hughes note \$75.50. J. R. Hughes \$25.00. J. R. Hughes \$37.00. H. F. Jordan \$15.00.

(Testimony of Sydney H. Stewart.)

F. H. Thompson \$50.00. F. H. Thompson \$100.00.  
J. F. Cleveland \$4,184.76. J. F. Cleveland \$32.60.  
Mary B. Lewis \$2,000.00. Mary B. Lewis \$10,000.  
There is a balance of Anna J. Lewis, the amount of which I do not know, because we have collected some partial payments. We have the cash or its equivalent. J. M. Phelps showing balance of \$337.53. Richard W. Bishop \$235.00. C. M. Pope \$1,138.28. W. S. Furman \$150.00, less partial payments. Fred Young \$200.00. That note has been paid and I have the cash. Alexander Moore \$36.00. Lucinda Lewis \$97.16. This is a balance less partial payments, which payments we have on hand at the present time. I have the abstracts of title mentioned in said exhibit. I have not the contracts of Tex and William L. Love. I have the Barkley and Eva S. Eddy contract. The Love contract has been converted into cash, which we have, or its equivalent. The proceeds of the Love contract amount to \$339.60. We have collected the Seaborn Stone note for \$6,500.00. We have the cash or its equivalent. All of these are held under stipulation and they are in this suit subject to the outcome of this suit.

Of the assets referred to in exhibit 4, consisting of [104—10] real estate, the first three pieces named in exhibit 4 constitute property turned over in the contract of December 31st. The other pieces that were turned over December 31st should have been turned over on January 27th, and in that event we have nothing to do with it.

By the COURT.—(To Mr. STONEMAN.) As I



(Testimony of Sydney H. Stewart.)

understand your statement, you only claim the first three pieces described in exhibit 4.

Mr. STONEMAN.—Yes, sir. We do not claim any property except the first three pieces in exhibit 4 and all the property in exhibit 10.

By the COURT.—Nine and ten as I understand it.

Mr. STONEMAN.—Yes, sir; nine and ten covers it, and the first three pieces in exhibit 4.

By Mr. STEWART.—The face value of assets as it is under date of December 31st, 1913, aggregated \$23,098.55, to which must be added the amount collected from the Seaborn Stone agreement. On January 1, 1915, \$8,893.97 of these assets have been converted into cash. There is no way of telling whether the remaining assets are worth face value.

By the COURT.—(Addressing Mr. STONEMAN.) You are claiming the securities themselves, as I understand it.

Mr. STONEMAN.—Yes, or their equivalent in cash.

By the COURT.—Do I understand, Mr. Stewart, that you have \$23,098.55 in cash or securities plus two items of moneys received on Seaborn Stone agreement amounting to \$3,288 and \$3,437.62?

A. Yes, sir.

By Mr. AINSWORTH.—That you have \$23,098.55 in notes and paper and \$8,893.97 in money?

A. No, sir. We have \$23,098.55 plus the proceeds from [105—11] the Seaborn Stone in exhibit 9. We have either the entire amount in cash or else the original securities. \$8,893.97 represents partial pay-



(Testimony of Sydney H. Stewart.)

ments on the \$23,000.00 securities. The two items, \$3,280 and \$3,247.62 is plus the \$23,098.00, and the balance which come out of the \$23,098.00. There are no other items that were turned over under the first agreement. The furniture and fixtures are presumed to have been turned over to us under the contract of January 27th, 1912. At the time they were turned over, they did not give us a bill of sale, but they asked us to leave them there and let them use it, which we did. This agreement was not made with me personally. I was talking with Mr. Bennett, Mr. Cleveland, Mr. Orme and different ones.

By Mr. STONEMAN.—I renew my motion to strike the answer, for the reason it is hearsay.

By the COURT.—The statement that he got his information from Mr. Cleveland and Mr. Orme will not be stricken. The statement that he obtained the information from the defendant corporation will be stricken.

Mr. AINSWORTH.—Was Mr. Orme vice-president at that time?

A. I think so. I think Mr. Cleveland was cashier. I do not know if Shedd ever was cashier. Cleveland might possibly have been the president. That could be ascertained from the records of the Union Bank books here. I believe Mr. Cleveland was president and Mr. Luther B. Smith was cashier.

By Mr. STONEMAN.—Do you mean that this furniture was turned over under the contract of January 27th or December 31st?

A. January 27th, 1912. All the other assets were

(Testimony of Sydney H. Stewart.)

presumed to be turned over, but this was not. It was always [106—12] my understanding, that the furniture was sold by the Union Bank to the Valley Bank under contract of January 27th.

Q. And that the furniture and these four pieces of property to which you have testified, referred to in exhibit 4, and all other property taken over by the Valley Bank under the contract of January 27th, 1912, from that time on were the property of the Valley Bank? Is that true?

A. I think I have already answered that, Mr. Stoneman.

Q. Well, is it true; is that your understanding of it?

A. Why, the property in exhibit 4, except the first three items, I claim always did belong to the Valley Bank, although the property did not go to the Valley Bank until December 31st, 1913. The title was acquired by the Union Bank & Trust Company on account of settlements they made.—

Q. Of their own property?

A. Of the notes which they had already pledged to the Valley Bank.

Q. And which the Valley Bank had a right to settle in any way it wanted to? A. Yes, sir.

Q. Who was it that made the exchanges and took those properties?

A. Mr. Cleveland obtained from the Valley Bank the Spaulding account, the Spaulding note and Bowers' note, which was exchanged in lieu of Parcel 4. These were the notes turned over to the Valley



(Testimony of Sydney H. Stewart.)

Bank under the first agreement. Mr. Cleveland was acting for the Union Bank & Trust Company. I presume he made the exchanges, because I took his receipt for the notes. Mr. Cleveland made the exchange [107—13] of the Redewell note. Also of No. 6. I cannot say who made the exchange of No. 7. The exchanges were made along in the middle of summer or the first of fall after the notes were taken by the Valley Bank under contract of January 27th, 1912. The contract of January 27th is the contract set out in exhibit "A" of the bill of complaint, and the contract of December 31st is set out in exhibit "I" of the bill of complaint.

Mr. AINSWORTH.—As I understand it, items 4, 5, 6 and 7 of exhibit 4 was property they held in some form in the Valley Bank under contract of January 27th, and that Mr. Cleveland of the Union Bank had taken those securities and made these exchanges for these particular pieces of property, and took the title in the Union Bank & Trust Company, and that afterwards the Union Bank & Trust Company by the last contract turned it over to the Valley Bank. Is that right, Mr. Stewart? A. Yes, sir.

By the COURT.—What I was trying to get at was to ascertain what connection the Union Bank & Trust Company, or its officers, had with these securities that were turned over on January 27th, 1912?

A. They always contended it was to their interest to get these notes liquidated and to cut down their indebtedness as quickly as possible.

By Mr. STONEMAN.—We object to that testi-



(Testimony of Sydney H. Stewart.)

mony, because it is contrary to other testimony put in the record by the witness himself, and it has not been shown that the witness is competent to testify to any parol change of the contract of January 27th.

By the COURT.—I overrule the objection and permit the witness to state the facts. [108—14]

Mr. STONEMAN.—Was that objection interposed in response to your Honor's question?

The COURT.—Yes.

Mr. STONEMAN.—Then I withdraw it.

Mr. AINSWORTH.—Were you assistant cashier at the time these changes were made?

A. I was assistant cashier of the Valley Bank. I made up the list marked as "Schedule" under the supervisions of Mr. Shedd, assistant cashier of Union Bank & Trust Company, from the books of the Union Bank Trust Company. We included in these lists everything shown by the books.

(The list is produced.)

Q. I will ask you to look at this one, entitled "Report of conditions January 27th, 1912." Who made up that first page, calling your attention to "Reserves and Liabilities"?

A. The statement was taken from the books of the Union Bank & Trust Company and was made up by the officers of the Union Bank & Trust Company. It was taken by Mr. Shedd, assistant cashier of the Union Bank & Trust Company and myself, assistant cashier of the Valley Bank.

I read into the record statement called "Report of the Condition of the Union Bank & Trust Company

(Testimony of Sydney H. Stewart.)

at Phoenix, at close of business on January 27th, 1912.” (Reads report.)

All the tangible resources totaling \$485,544.13 was taken over by the Valley Bank. The assets exceeded the liabilities at face by \$54,745.49. The liabilities assumed to be paid by the Valley Bank aggregated \$430,798.64, subject to errors and omissions. The total resources amounted to \$485,544.13, subject to errors and omissions, and in that we included the furniture and fixtures. We proceeded with [109—15] the assistance of the officers of the Union Bank & Trust Company, including Mr. Cleveland, Mr. Shedd and Mr. Orme, to liquidate these resources. Mr. Cleveland and Mr. Shedd took part in this and interviewed different ones on these notes. As an example Mr. Cleveland took the note of E. A. Spaulding and Bowers and made settlement on these notes. Mr. Shedd was there in the Valley Bank and helped out in carrying out the liabilities and in collecting resources. Mr. Cleveland, Mr. Orme, Mr. Swettman and Mr. Luhrs asked me at various times how collections were coming along, and we had meetings and went through these assets at various times. We did not collect all the assets mentioned. We converted \$364,631.67 up to the end of the contract, January 27th, 1915. We paid out on liabilities \$430,783.59. In the \$8,839.97 collected under the second contract, there was not included money received for furniture and fixtures made under sale by order of this Court. Sale has not been completed.

Mr. STONEMAN.—I direct your attention to



(Testimony of Sydney H. Stewart.)

wording of Defendant's Exhibit "I." On the following page appears to be a report of the condition of the Union Bank & Trust Company at the close of business January 27th, 1912. There was included in that no specification of items turned over to the Valley Bank?

A. There was not any detailed list made of furniture and fixtures. Later on, the list appearing on second page of Defendant's Exhibit "I" of assets turned over by the Union Bank to the Valley Bank under contract of January 27th, was made. The Union Bank was to turn over all the other assets as shown by that statement. We made a detailed account of all assets, but no detailed account of furniture and fixtures. [110—16] We did not make a list of furniture and fixtures according to that statement of resources as shown by Defendant's Exhibit "I."

Q. Is not this list the list referred to as exhibit "B" in the written agreement of January 27th, 1912?

A. To the best of my knowledge it is.

Q. And constitutes all the assets at that time purchased by the Valley Bank from the Union Bank with the exception, as you claim, of the bank furniture and fixtures? A. I believe it does.

Q. Now, was it not intended when this transfer was completed in January, 1912, between the Union Bank and the Valley Bank, that the Valley Bank should take over everything which the Union Bank had specified in this list?

A. It was, with the understanding that they could use that.



(Testimony of Sydney H. Stewart.)

Q. Use what? The furniture and fixtures?

A. Yes, sir. That is the reason we did not make a detailed list of them. With the exception of the furniture and fixtures, the contract of January 27th, reading the list which is referred to in that contract as exhibit "A," contains all the property which the Valley Bank took from the Union Bank, so far as I know. That was all turned over, and the understanding was made between the Union Bank and Valley Bank, or by the Union Bank, to use the furniture and fixtures and conduct a trust business. We had no use for them, and did not make an itemized statement of the furniture and fixtures. When this contract was completed, the Union Bank had practically gone out of the commercial business. On January 27th, 1912, the furniture and fixtures belonged to the Union Bank & Trust Company. [111—17]

Q. Subsequent to the execution of the contract of January 27th, who did the furniture belong to?

A. It was supposed to belong to the Valley Bank, and we allowed the Union Bank to use it.

Q. And it was the Valley Bank's own property?

A. Yes, sir.

Q. The Valley Bank could have sold it at any time it wanted to?

A. Yes, sir. And the furniture and fixtures was put up as collateral the same as the notes and securities, and like that. [112—18]

E. J. Henning, Counsel for plaintiff, stated: The books of the Union Bank and Trust Company are in Los Angeles, in custody of the Federal Court there.

(Testimony of Sydney H. Stewart.)

The two hundred fifty-one (251) shares that, according to the former testimony, constituted absolute control of the common stock, then stood and now stand under the name of the Western Underwriting and Mortgage Company. The testimony of Mr. Smith, the secretary, was that the Western Underwriting and Mortgage Company holds that stock as collateral only, and is not the owner of it, and that the true owner of it is J. K. Tennant, and Tennant at all times refused to vote that stock, taking the position that the title is now in plaintiff. We then offer an amendment to our complaint to conform to the testimony of Mr. Smith, which was granted. That was the testimony I referred to at the former trial.

Mr. AINSWORTH.—So far as the stock standing in the Mortgage Company, I have no doubt about it, but since the last trial we have discovered some testimony, and we think of their own admissions claiming themselves to be owners of that stock. We have the testimony here where they claim themselves to be the owners, and if those minutes were here—Some of the testimony that I got from Mr. Klien was in the record here and was in the record of the Union Bank and Trust Company that you say the district attorney has taken away now. I suppose it was up here when I came up this morning until they raised the question about it.

By the COURT.—The question is whether or not you will admit the evidence and admit the statement made by counsel for the plaintiff with reference to



(Testimony of Sydney H. Stewart.)

ownership of the stock.

By Mr. AINSWORTH.—I will admit that it stands on the books of the corporation of the Western Underwriting Mortgage Company 251 shares of the capital stock of the Union Bank and Trust Company. [113—19]

By the COURT.—I will adjourn now until half past one, and give counsel an opportunity to see whether they can enter into a stipulation which will avoid the necessity of having the books produced.

The Court having convened at one-thirty, Mr Henning stated: “It is stipulated that 251 shares of the common stock of the Union Bank and Trust Company stands in the name of plaintiff since June 31st, 1913, and has continued to stand in the name of plaintiff ever since, and that 251 shares constitutes a majority of the common stock of Union Bank and Trust Company; That Mr. Rosa, at the time of commencement of this action owned a majority of the remaining common stock of United Bank and Trust Company.

Mr. AINSWORTH.—And another thing that that stock actually belonged to the Bank at that time or about that time.

By Mr. HENNING.—You mean the Western Underwriting and Mortgage Company?

By Mr. AINSWORTH.—It actually belonged to them in June, 1913.

By Mr. HENNING.—Well, it is further stipulated that either the latter part of June or early in July, 1913, Mr. McGhee, one of the attorneys for



(Testimony of Sydney H. Stewart.)

Western Underwriting and Mortgage Company appeared before a meeting of the stockholders of Union Bank and Trust Company at Phoenix, Arizona, and stated that the Western Underwriting and Mortgage Company was owner of 251 share of common stock of the United Bank and Trust Company.

By the COURT.—Now then, as I understand it, you stipulated that the 251 shares of common stock was in the name of plaintiff and owned by plaintiff, and is still owned by plaintiff.

By Mr. HENNING.—No, that is not the stipulation. The stipulation is that it stood in the name of plaintiff since June 21, 1913, without proving the ownership since commencement [114—20] of this action, but that subsequent to the time of its issue, Mr. McGee appeared at a meeting of the Union Bank and Trust Company and stated that the Western Underwriting and Mortgage Company is the owner of 251 shares of the common stock of Union Bank and Trust Company.

By the COURT.—While you were making this stipulation, both this time and the time before, Mr. Ainsworth made the suggestion that the Underwriting Company was the owner at that time. You do not seem to agree on this.

By Mr. HENNING.—We expect to introduce proof that it became the property of Tennant, also it remained standing in the name of plaintiff and has been held by plaintiff since September, 1913, as collateral to a note. My statement was that a representative of the plaintiff said the plaintiff actually

(Testimony of Sydney H. Stewart.)

owned it on June 21, but we expect to prove that it became the property of Mr. Tennant, although it remained standing in the name of the plaintiff. We have reached an agreement that at the meeting on July 9th, we asserted the ownership of that stock. We intend to prove that subsequent to that time we sold that stock to Mr. Tenant, and before the bringing of this action, and that at the time of the bringing of this action, it was the property of Mr. Tennant.

By Mr. AINSWORTH.—Of course I do not admit the sale. We do not know anything about this. We claim that in June, 1913, this stock actually belonged to the plaintiff. It is admitted that common stock is the only stock having voting power in Union Bank and Trust Company, and there are only 500 shares of it, and these 251 shares are a majority of it.

**[Testimony of G. C. Smith, for Complainant.]**

G. G. SMITH, called as a witness on behalf of the plaintiff, being first duly sworn testified as follows:

By Mr. STONEMAN.—I hand you a note dated December 22d, 1913, purporting to be signed by J. K. Tennant, and the certificate [115—21] of 251 shares of the common capital stock of Union Bank and Trust Company attached thereto. Have you ever seen that note and stock before? I have. (Note and certificate of stock marked exhibit “A” for identification.)

By Mr. STONEMAN.—I desire to read this note into the record. Objection by Mr. Ainsworth.

By Mr. STONEMAN.—The offer is made as tending to show the ownership of the 251 shares of com-



(Testimony of G. C. Smith.)

mon stock attached to the note as collateral security prior to the bringing of this suit.

By the COURT.—The ownership on the part of Tennant?

By Mr. STONEMAN.—Yes, sir.

By the COURT.—It may be admitted, and objection is overruled.

By Mr. STONEMAN.—This note is as follows:

\$40,000.00                      San Diego, Cal., Sept. 22d, 1913.

On or before eight (8) months after date, I promise to pay, for value received, to the Western Underwriting and Mortgage Company, the sum of Forty thousand (\$40,000.00) Dollars, gold coin of the United States of America, at its office at the city of San Diego, California.

I herewith pledge as security for the payment hereof two hundred fifty-one (251) shares of common stock of the Union Bank and Trust Company, a corporation, of Phoenix, Arizona, attached hereto.

Signed by J. K. TENNANT.

By the WITNESS.—I know the signature of J. K. Tennant. That is his signature.

By Mr. STONEMAN.—Will you explain to the Court how this certificate, if you know, of 251 shares was attached by J. K. Tennant as security for the payment of the promissory note which I have just read.

A. You mean regarding just the transaction that attached [116—22] it to this note?

A. Yes, sir.



(Testimony of G. C. Smith.)

(By Mr. AINSWORTH.)

The WITNESS.—Since last August, 1914, I have been secretary and manager of the Underwriting Company. I was not connected with this company in 1913. My knowledge of this transaction is not necessarily based on what the company told me. I attended several meetings and also directors' meetings in 1913. I was not present at the time this note was given. I was at a conference afterwards; the matter was talked over. My knowledge is not derived altogether from something told me afterwards. After the note was executed, I was told what happened. I based my evidence from the records of the corporation.

By Mr. AINSWORTH.—Then we object to it, as the records are the best evidence.

By Mr. STONEMAN.—Q. Did you have any talks with Mr. Tennant himself?

A. Yes, sir, and every member of the board that was present when it was made. I talked just prior to March 5th, 1913, when this suit was filed, and just prior to the time this note was given, and afterwards I talked with Mr. Tennant himself. Tennant merely settled the suit with the Underwriting Company, which the Underwriting Company brought against him for Sixty-five Thousand (\$65,000.00) Dollars. I was present at a couple of conferences before the settlement. I saw the pleading in the suit. I knew the suit was filed and I was in Los Angeles when it was filed.

By Mr. AINSWORTH.—We object to what Mr.

(Testimony of G. C. Smith.)

Tennant said about it after the suit was filed. It is hearsay; it is simply a statement of past transactions and hearsay.

By the COURT.—I will admit it subject to the objection of defendant. I may exclude it later on.

By the WITNESS.—He spoke regarding this stock several [117—23] times. The last distinct time I remember, he told me he had bought the stock back and was going to sell it at a good profit for himself, that our company were fools for letting him have it. Prior to March 5th, 1914, Tennant told me he owned this stock.

By Mr. STONEMAN.—Now relate to the Court the conditions, as nearly as you know them, explaining the apparent discrepancy as shown by the stock transfer books of the Union Bank and Trust Company; why this certificate now appears in the name of Western Underwriting and Mortgage Company, instead of in the name of Tennant, whom you say claims the ownership of this stock.

By the COURT.—Objection sustained because the question as framed calls upon witness to make a statement with reference to some entry in the books, and the books are the best evidence.

By Mr. STONEMAN.—Exception. Do you know why this certificate appears to be standing in the name of the Western Underwriting and Mortgage Company? A. Yes.

By Mr. AINSWORTH.—From what source do you receive your information?

A. A letter from Lloyd B. Christy more than any-

(Testimony of G. C. Smith.)

thing else. I have the letter in my hand. (Admitted by Mr. Ainsworth; the letter is signed by Christy.)

By Mr. STONEMAN.—We ask to read this letter into the record.

By Mr. AINSWORTH.—Objection on the ground that it is irrelevant and hearsay. It is simply some transaction between somebody and the Bank and has no bearing on this question. Mr. Christy is simply stating what somebody else told him.

By the COURT.—The objection is sustained. (Will mark [118—24] exhibit “C” for identification.) I do not know from my own knowledge whether or not Tennant, if he had been requested so to do, would have voted any shares of stock owned by him in favor of the bringing of this action.

Cross-examination by Mr. AINSWORTH.

Isn't it a fact, Mr. Smith, that Mr Tennant has repeatedly stated to you prior to March 5th, 1914, that the Western Underwriting and Mortgage Company owned the stock and that he did not own it.

A. No, sir, he never told me that.

Q. Didn't he tell you that they fell down on the contract, and that they owned the stock and he didn't.

A. No, sir. He never has to this day told me that the company owned it.

Q. Didn't he tell you that he never bought the stock back because they never carried out the contract.

A. No, sir. In January of this year, I went to



(Testimony of G. C. Smith.)

Tennant myself to give him the right to vote this stock over here, and he said he would not vote it, and would not have anything to do with it, and I said we cannot vote it. He said, if you don't, I will hold you for any damages which I sustain.

Q. Hasn't he said in his answer that you were absolute owners of that stock in the suit that you brought. Isn't that the substance of it?

A. No, sir. He not only claims that we have got to take the stock for his notes, but claims that we have to give him Ten Thousand (\$10,000.00) Dollars besides.

By WITNESS.—A short time after September, 1913, Tennant did claim to own this 251 shares of stock, and the only reason he would not take it was that he wouldn't be compelled to take the stock because the Western Underwriting and Mortgage Company didn't carry out their contract. That is the defense he sets up to the Forty Thousand (40,000.00) Dollar suit. After that [119—25] time he told me he was going to sell it and make a nice profit for himself and the company was a fool to let him have it. The Western Underwriting Company has never considered the stock as theirs. The collateral was not sold because we would have to have a judgment before we could sell it.

By the COURT.—When did you file your suit?

A. Mr. Henning could tell you more about that than I can.

By Mr. HENNING.—The answer was made October 14, 1914. I might say to Mr. Ainsworth that

(Testimony of G. C. Smith.)

I have here a correct copy of the answer, and would be very glad to let him have it, and very glad to have it offered in evidence.

By Mr. AINSWORTH.—Did you say you have not exercised any rights of ownership since the note was given?

A. Well, there never has been any acts in the minutes regarding this at all, and none since I have been in the office since August, 1914. This note was given in September, 1913. The minutes would show whether they exercised any rights of ownership prior to the time I went in.

Q. Then you do not know of your own knowledge whether they tried to sell it or anything like that?

A. They could not sell it.

Q. Why not—because it did not stand in their name?

A. Why. I could not sell a horse just because it was in my barn.

Q. Didn't they endorse it?

A. Yes, sir. [120—26]

**[Testimony of Joseph S. Jenckes, for Complainant.]**

JOSEPH S. JENCKES, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

On and prior to the 5th day of March, 1914, I was vice-president and acting secretary of Union Bank & Trust Company. I know W. L. Rosa. Our firm represented him in a personal matter he had before this Court. Prior to March 5, 1914, I was acting under instructions from Rosa with reference to the

(Testimony of Joseph S. Jenckes.)

interest which Rosa had in Union Bank & Trust Company at that time, i. e., prior to the filing of this suit. We had instructions from him with reference to this action. Not this particular action, but with reference to any action on the part of the bank against the Valley Bank, he being president of Union Bank & Trust Company.

Mr. STONEMAN.—Under those conditions, did you know whether Mr. Rosa would have consented, as a member of the board of directors and as a stockholder, to Union Bank & Trust Company, to the bringing of a suit by Union Bank & Trust Company?

By Mr. AINSWORTH.—We object to that question.

By the COURT.—We admit it subject to defendant's objection.

WITNESS.—The last word I had from Rosa, he was in Los Angeles. A demand was made upon me, as a member of the board of directors of Union Bank & Trust Company, prior to March 5th, 1914, asking the Union Bank & Trust Company to institute this suit for the accomplishment of that which is sought in this suit. I was a member of the board at that time. The board refused to bring this suit. It is my recollection the board of directors acted upon this demand, and it is a matter of record in the minutes. The minutes are in the hands of the court in Los Angeles. [121—27]

Mr. AINSWORTH.—I would rather have the minutes then.

By the COURT.—Then I will sustain this objec-



(Testimony of Joseph S. Jenckes.)

tion, and let it stand until to-morrow morning, and I will let you introduce the records at that time. I will permit you to introduce those, even though you have rested your case.

By Mr. STONEMAN.—I am going to make this suggestion. This testimony merely bears upon the jurisdiction of this Court, to further entertain these proceedings, and it may be proven now or later on. In the meantime, if the books should sustain our contention, that this Court has jurisdiction, we could proceed with the case as far as we can.

By the COURT.—I want you to proceed as far as that evidence is concerned. I will give you an opportunity to introduce the books for that purpose.

By Mr. STONEMAN.—Do you know whether that demand had been made on Rosa personally as a stockholder to vote in favor of a resolution directing the board of directors to institute this suit, whether Rosa as a director would so have voted?

Mr. AINSWORTH.—I object to that, because Rosa controlled a minority of the stock anyhow.

By the COURT.—Well, as I understand it, he controlled a majority of all the stock that was claimed by plaintiffs, or rather claimed by Tennant. The stock they sold to Tennant.

Mr. AINSWORTH.—Well, that has not been proved.

By the COURT.—Of course, this is to be taken together with all the other evidence on that subject. You cannot introduce it all at one time. I admit it subject to defendant's objection.

(Testimony of Joseph S. Jenckes.)

WITNESS.—I do not know, Mr. Stoneman, what Rosa would [122—28] have done if such a demand should have been made upon him, but I do know the matter was discussed with Mr. Rosa,—the question of bringing an action of this kind against the Valley Bank, and the matter was left entirely in our hands, and Mr. Rosa informed us he would be guided by our advice.

Q. Now, at the time and immediately prior to the bringing of this action, would you, in behalf of Rosa, have authorized the action?

Mr. AINSWORTH.—We object to that. The question as to putting it up to your attorney as to whether they would bring a suit or not. They are not the stockholders.

By the COURT.—Well, under this equity rule, the plaintiff is required to show what efforts he has made to induce the stockholders to bring a suit. I do not believe we should be as technical in the admission of evidence on that question as on some other questions. Anything which tends to show good faith on the part of the plaintiff, and what he has done or had done before the institution of the suit, to obtain action by the directors or officers of a corporation or of shareholders, should be admitted. I will hear all this testimony before finally ruling, and I will admit it subject to your objection.

Mr. STONEMAN:—Q. Assuming, Mr. Jenckes, that the record will bear out this statement, that a demand was made by the Western Underwriting & Mortgage Company upon the directors to bring this



(Testimony of Joseph S. Jenckes.)

suit, and the directors refused. As a member of the board of directors, are you able to state whether such refusal on the part of the board of directors was the result of any collusive action or agreement between Western Underwriting & Mortgage Company and the board of directors of Union Bank & Trust Company? [123—29]

A. I am able to say it was not upon any such collusive arrangement. I want to state that this matter of bringing this suit by the Union Bank & Trust Company against the Valley Bank was gone into very carefully by Mr. Struckmeyer and myself and Mr. Rosa and discussed in the directors' meetings. Also Mr. Klein, who was the cashier of the company was present, and we, at that time, came to the conclusion, that it was not the best thing to do to bring this suit at that time. There was absolutely no collusive arrangement with the Western Underwriting & Mortgage Company or the attorneys for the Western Underwriting & Mortgage Company.

By the COURT.—Was that decision arrived at after the demand had been made upon that corporation, that they bring such an action?

A. No, sir. The decision was arrived at before, concerning the bringing of the suit by the bank itself. I think the Western Underwriting Company felt the suit should be brought. A member of Mr. Henning's firm was here, and they thought we should bring a suit, and we told them the reasons why we thought the suit should not be brought, and *subsequent* this demand was brought on us.



(Testimony of Joseph S. Jenckes.)

By the COURT.—Now, as to the action that was taken by the directors, you may await the arrival of the minute books.

By Mr. AINSWORTH.—What was the reason you did not want to bring it?

A. The reason was, that we had something like thirty-one or two suits pending in the Superior Court of Maricopa County by the bank against the various people who had given their notes for stock in the company, and the pleadings [124—30] in those cases, i. e., the allegations on the part of the bank and the allegations on the part of the people who were defending and also suing the bank,—the suits were brought against the bank and by the bank against the parties who gave the notes,—and if we had brought the suit in the State Courts at that time, and set up a lot of facts upon which we would have to bring this suit, we thought it would depreciate our chances of winning the suits in the state courts against the note makers. The proposition was discussed as to whether it could be brought in the Federal Court by anybody else, so that we would have to appear and stultify ourselves as it were. In other words, we thought it might hurt us, if we brought the suit in the state courts. We hoped to bring the suit later against the Valley Bank. It was not an absolute refusal. We thought the time was not yet ripe to bring the suit.

By Mr. STONEMAN.—If your Honor please, we have come to the point in the case where, in the event your Honor feels it to be necessary to submit

(Testimony of Joseph S. Jenckes.)

any further evidence touching the refusal of Tennant as a stockholder as we claim of the Union Bank & Trust Company to bring this suit, or the futility of making a demand on him as a stockholder to bring this suit,—It will be necessary for us to ask your Honor to receive the testimony of Mr. Henning, through whom all this business was transacted, and into whose custody was given the dealings with Tennant. No one, not even the officers of the Western Underwriting & Mortgage Company themselves, could testify except on information from Mr. Henning. The objection would be, if we introduced any officers, that it is heresay from Mr. Henning. We recognize that it is unusual, both Mr. Henning and myself realize that it is a disagreeable thing to request, and we leave [125—31] the matter in your Honor's own judgment, and shall be satisfied with your judgment.

By the COURT.—I do not like to rule at this time that I think the evidence is sufficient, but while I realize the embarrassment that comes to a lawyer when he is called upon to testify, the exigencies of the case seem to require it, and it is entirely proper for him to do so.

Mr. STONEMAN.—We thank your Honor for the consideration and I will call Mr. Henning.

[Testimony of E. J. Henning, for Complainant.]

E. J. HENNING, was called as a witness on behalf of plaintiff, and being first duly sworn, testified as follows:

I and my firm have been for some time past coun-



(Testimony of E. J. Henning.)

sel for Western Underwriting & Mortgage Company, a corporation in San Diego. I am acquainted with J. K. Tennant, and also with Judge Trask, of Los Angeles, who is now dead. Judge Trask at the time I knew him at different times was attorney for J. K. Tennant. Based upon statements made to me, Tennant would have refused to vote any stock or vote this stock, had he been requested as a stockholder to bring this action:

By Mr. AINSWORTH.—Objected to as hearsay.

By the COURT.—Objection overruled.

Before the annual meeting of the Union Bank & Trust Company in January, 1914, Judge Trask was at that time counsel for and representing Mr. Tennant in this matter. Just prior to that he appeared for Tennant in the suit we brought against Tennant, which, however, had been settled. Judge Trask represented Tennant in the settlement, which resulted in this forty thousand dollar note to which the stock certificate is attached. Judge Trask called me on the 'phone and stated the Western Underwriting & Mortgage Company had failed to carry out its agreement with him and Mr. Tennant; that this stock certificate for 251 shares of Union Bank & Trust Company was to be transferred on the [126—32] books of the trust company to us. That was the word he used. From the record it appears Mr. Silvers. And he said the annual meeting is tomorrow and we are unable to use that stock. I did not know at the moment just what had been done and asked for a little time to look in the record.



(Testimony of E. J. Henning.)

Mr. McGee, my partner, and I went into *the and* the books, and we found that the transfer had not been made. A demand had been made for a certified copy of the resolution, and we found there was no such resolution. Mr. McGee and I both talked with Judge Trask over the 'phone, tendered them the proxy or agreed to wire to someone in Phoenix and have them attend the meeting and vote as they desired he should vote on the election of directors or other important matters, or send someone to the meeting to ask for an adjournment until the transfer could be made. Judge Trask said you have violated your agreement and we decline to have anything further to do with the transfer of your stock. As the outcome of that situation, a suit is pending in Los Angeles County, in which Western Underwriting & Mortgage Company is plaintiff against Tennant on this forty thousand dollar note. In that suit, Tennant answered through Mr. Brown, the partner of Judge Trask when this all occurred, and in his answer he sets up that we violated our agreement, and because of the fact that he couldn't control the meeting at Phoenix, the stock had become of little value, and asks that the note be cancelled and we be required to accept that stock in settlement of the note, and pay him the difference between the \$40,000.00 note and the value of the stock when it was given to him, that is \$50,000.00, and asks for judgment in the cross-complaint in the sum of \$10,000.00. Mr. Tennant, at the time Judge Trask talked to me over the phone repeatedly told

(Testimony of E. J. Henning.)

me that "You have violated your agreement, [127—33] and you will have to keep this stock," insisting that he could not keep this stock, and that it was not in his name. I would not like to fix dates, because Mr. Tennant said it so often. I know that when this suit was brought here, that we advised you that it wasn't any use advising Tennant about it.

(By Mr. AINSWORTH.)

WITNESS.—Tennant did not specifically say we owned the stock, but he said, "You can keep it." About the 21st of June he did say something equivalent to saying we owned it then. At that precise time, we were not attorneys for the corporation except in the suit brought against the corporation. I might say, we found the stock in the records, in the files of the corporation, and assumed that it did belong to the corporation, and exercised rights of ownership over it. It was never transferred back to Tennant in any form. Tennant said the stock was not his, but he never says it was the property of Western Underwriting & Mortgage Company. It stands on the books of the Western Underwriting & Mortgage Company and has not been transferred to him since June, 1913.

By the COURT.—If it be admitted that the records of the corporation will, when introduced, show that the managing directors for the corporation, for any reason, declined or refused to bring this suit upon request, then I think the showing made by plaintiff, showing its efforts to secure the action



(Testimony of E. J. Henning.)

which it desired on the part of the managing directors of the corporation and the stockholders is sufficient, and hold that the court has jurisdiction to hear and determine this matter. But of course, I do not announce that ruling to go into the record to hold that unless the [128—34] records be introduced to show the facts as referred to by Mr. Jenckes, I sustain your objection to the statement of the witness, because the record would be the best evidence of that, but if it be admitted that the records will show that, then I shall hold that this Court has jurisdiction. Whether Tennant did or did not hold the shares of stock, evidently there was a dispute as to the ownership, and this man Rosa had left the matter entirely to his counsel and that they thought it was not best for any reason to bring the suit at that particular time, then I think the plaintiffs in this case, are authorized to bring the suit. In other words, I do not think that it is incumbent upon the plaintiffs to wait indefinitely to determine, or for the directors to determine just when and at what time they would bring this action against the defendant. You may now proceed with the other branch of the case.

By Mr. STONEMAN.—I think, your Honor, that we will submit our case. Mr. Henning and I believe we have introduced proof of everything which was not submitted by the answer with the exception of tying up by the record of the minutes, which will be here tomorrow, and we therefore rest.

Mr. AINSWORTH.—Well, we cannot go ahead



(Testimony of E. J. Henning.)

now because if the record shows what we think it does, we do not think they have any action at all.

By the COURT.—I understand that a demand was made on Klein to bring a suit at that time, as testified to by the witness Jenckes. I say if they did take any action, the minutes would be the best evidence. If the demand was made and not complied with, then this testimony would be received to the effect that such a demand was made, and that they didn't take any action. [129—35]

By Mr. AINSWORTH.—Then we shall move to dismiss this action on the ground that they have not shown any fraud, in that these officers did not have the right to transfer this property to this bank at this time. There is no evidence in this case but what they had the perfect right. They allege we (they) transferred it and we say we (they) did. We maintain that the bank had the perfect right to make this transfer for the indebtedness that they admit.

By the COURT.—I do not know how much of the allegations you have admitted in your answer. I am not prepared to rule on that question without some further light on the subject.

By Mr. AINSWORTH.—This brings us down to the pleadings practically if the Court pleases, and they rest their case on simply putting in the fact that we obtained these certain securities under the second contract. Now, I submit that this Court cannot render a judgment for this plaintiff on these pleadings for any amount whatever at the present

(Testimony of E. J. Henning.)

time, conceding the fact to be that the first contract was entered into as stated, and that the second contract was entered into, and that it was a qualified admission, we say that this was turned over, the first as security, and that the second was on account of paying a debt that they then owed. Now, they haven't proved anything to the contrary. Now, to get down to the facts; of course this is a pretty long complaint, and I realize that the Court would not understand offhand what our admissions cover because our admissions cover a great amount of ground. This morning the only evidence that was introduced was the things that went into the first contract and what went into the second contract. I do not see how the Court can render a judgment if we stop right here. Now, in order to get at this, it will be necessary for the Court to read the complaint if the Court [130—36] is not familiar with it.

(Thereupon the pleadings were discussed at length by Mr. Ainsworth.)

By the COURT.—I should like to hear from plaintiff's counsel.

(Argument by plaintiff's counsel.)

By the COURT.—(To Mr. AINSWORTH.) In other words, I understand your motion to be, that the pleadings in this case disclose that there were two valid contracts executed.

(By Mr. AINSWORTH.—Yes, sir.

By the COURT.—And that the plaintiffs have not shown the invalidity of either of these contracts, and that therefore the plaintiff is not entitled to recover.



By the COURT.—(To Mr. STONEMAN.) Is the Court to assume that there was no consideration for the second contract?

By Mr. STONEMAN.—There could not be from the pleadings themselves. There is the unlawful assumption that there existed an indebtedness from the Union Bank to the Valley Bank under the contract of January 27th. May it please your Honor, I direct your especial attention to the fact that the contract of December is predicated on the contract of January 27th. It is mentioned all the way through, and it could not be because of the necessity of pleading a parol destruction of the written contract of January 27th.

By the COURT.—That, it seems to me, is the point. If the bank itself really recognized the first contract, and for that reason or by reason of any subsequent or contemporaneous parol contract, enters into a valid second contract, is there anything in the pleadings upon which the Court can now hold that contract was void?

By Mr. STONEMAN.—If your Honor please, The Union Bank & Trust Company attempted under the contract of December to [131—37] say that it owed the Valley Bank a certain specified sum of money under the terms of a contract of January 27th.

By Mr. STONEMAN.—As against a minority stockholder whose interest was affected, we say “no.” We say that on the face of the transaction itself, neither the Union Bank nor the Valley Bank



had the right to execute the contract of December, and they never would have that right unless an indebtedness existed. And if an indebtedness did exist, it was only under the terms of the parol contract.

By the COURT.—Now, will this Court say, taking the original contract of January 27th, 1912, and the contract of December 30th, 1913, and the pleadings in this case, may this Court as a matter of law determine that there was no consideration for the second contract, that the officers of that corporation had no authority to execute it? That it was a fraud, a legal or an actual fraud, upon minority stockholders? May this Court conclude from those contracts and from the pleadings that no such authority existed on the part of the Union Bank & Trust Company to execute that subsequent written contract, embodying what was, so far as the contract itself goes, their understanding of what the original contract was intended to be, and their understanding of any subsequent or contemporaneous parol contract.

By Mr. STONEMAN.—My answer to that is this, that if, from an examination of these pleadings, it appears that the authority and the legal existence of the contract of December 30th must be made to depend upon the contract of January 27th, and construing these two contracts together, if the contract of January 27th shows that it was fully executed, and that there existed no indebtedness for which the Union Bank could be charged, as is attempted to do in the contract of December 30th, then you

must look somewhere else to discover [132—38] whether or not the board of directors of the Union Bank & Trust Company had the authority to execute the contract of December 31st, because the consideration was that the Union Bank was indebted to the Valley Bank at that time. And the only place you can look to discover that fact is the parol contract pled in the answer and upon the validity of which rests the entire defense of this action, because the written contract absolutely precludes the possibility of their existing an indebtedness subsequent to the turn-over.

By the COURT.—I will grant you that that would be the legal presumption, that the Court would be called upon to reach that conclusion, but isn't the burden of proof upon you to attack the validity of that subsequent contract? Isn't it incumbent upon you to show that the corporation had no authority in the first instance, or if they did have that authority, that the contract was without consideration and void and a legal fraud on the stockholders of the corporation.

(Argument by Mr. STONEMAN.)

By the COURT.—Mr. Stoneman, this is a suit by the corporation. It is true that it is brought in the name of the stockholder because the corporation itself declined to bring the suit. Now, then, this corporation, the plaintiff in the suit, and the defendant corporation, on December 30th, 1913, had the right, did they not, all things being regular, to construe the contract of January 27th, 1912?



Was there anything to prevent them from construing that contract as between themselves, and having so construed it between themselves to mean that the plaintiff, the Trust Company, owed the defendant, the bank, a certain sum of money, isn't that binding, not only upon the Union Bank & Trust Company, but if lawfully made and without fraud on its part or upon the part of the defendant corporation, binding [133—39] upon all of its stockholders. Had they not the right to construe that contract as it was intended to be, as it was, or as they expected it to be. I am referring to the written contract of December 30th, 1913, which treats the contract of January 27th, 1912, as a security for debt and not as an absolute sale as the instrument itself seems to make it.

By Mr. STONEMAN.—Yes?

By the COURT.—Now, then, upon that, and without considering the question of whether contemporaneous with the contract of January 27th, 1913, there was a parol agreement between these parties, which they had the right, it seems to me, to recognize at the time they entered into the contract of December 30th, I say are you not bound by the construction which the corporation itself, for whom you sue, placed upon it?

By Mr. STONEMAN.—I do not believe so if it can be determined from the contracts that it was void for absolute want of consideration.

By the COURT.—Isn't that a defensive matter? You cannot presume there was a want of consideration, can you?



By Mr. STONEMAN.—Suppose, if your Honor please, that Mr. Henning told me that I owed him eight hundred sacks of grain, and under a misconception of the facts, I had paid him eight hundred sacks of grain and had turned them over to him, and it turned out afterwards that I didn't owe him but three hundred sacks of grain. Now, I certainly would have the right to sue Mr. Henning for that five hundred sacks. Now, if this board of directors, under the mistaken idea that they might construe the contract of January 27th so that an indebtedness was admitted to exist from the Union Bank to the Valley Bank of seventy-five or eight thousand dollars, executed a new contract, it would not mean that a stockholder was [134—40] bound by their mistake, providing that you could look to the contracts themselves and found that there could have existed no indebtedness. It is susceptible of only one construction. I say that this contract is a sale on its face, and there is, in the answer, no transaction between the Valley Bank and the Union Bank which could have given rise, between January, 1912, and December, 1913, any indebtedness between the Union Bank and the Valley Bank. Their dealings ceased on January 27th, 1912. Now, if the Union Bank, then, we speaking for the Union Bank, cannot go to the Valley Bank and say to the Valley Bank, "You have taken from us \$75,000 worth of assets which you have not any right to take," or according to the testimony here, something like \$33,000 worth: "You had no right to take it; there was no consideration for it."

We submit this contract for your consideration from which you can see that we do not owe it to you, and we want it back.”

By the COURT.—And you admit that it did not exist?

By Mr. STONEMAN.—If your Honor please, are we bound because we have admitted something which could not exist?

By the COURT.—You have admitted it by your contract of December 30th, have you not?

By Mr. STONEMAN.—I suppose we have in so far as there was any authority to admit it; I am speaking as the Union Bank and not as the stockholder.

By the COURT.—Now, then, if that be true, if you have admitted it, how can you ask the Court to assume that there was no consideration for that admission?

By Mr. STONEMAN.—Because we have come into court and shown the Court that there was a mistake and shown the Court that the consideration could not have existed with the [135—41] proof out of their own mouths. We think it is up to them to establish the validity of the parol contract, and when they attempt to do that, we submit the rule that they cannot introduce such evidence for the parol contract to qualify the terms of a written contract.

By the COURT.—Now, let us see. On December 30th, you say that you—I am reading from page 2 of exhibit one, you said that you were indebted—that you executed a note for \$164,000 on the 17th day of



May, 1913, and that there remains due upon this note approximately \$75,000.00.

(Discussion.)

By the COURT.—It seems to me from the discussion that was had when the demurrers were argued, or rather the motion to strike was argued, the construction and the opinion that I got at that time, from the reading of the contract originally entered into, the one of January 27th, 1912, that it might well be construed as the parties afterwards did construe it, that is to mean a security for a debt. It is most unusual for a person who buys property, notes and securities outright, to take one as a guarantee for them guaranteeing the purchaser against loss, and it seems to me, if this case were to proceed, that the defendant would be allowed to introduce [136—42] testimony to show what the real transaction or agreement was. But aside from that, I am of the opinion that in this case the plaintiff corporation, in entering into the contract of December 30th, 1913, as it had a right to do, recognized the transaction, the original transaction as a security for an indebtedness, and that the stockholders of the corporation, including the plaintiff who sues on its behalf, are bound by that contract, and under the state of the case, I feel compelled to grant the motion for judgment on behalf of the defendants, and there the motion will be sustained and judgment will be entered for the defendants.

By Mr. STONEMAN.—If your Honor please, we desire the record to show an exception on the part of the plaintiff to your Honor's ruling, and I am not



familiar whether a motion for appeal is required at this time or not.

By the COURT.—You may give notice at this time, if you desire.

By Mr. STONEMAN.—And from the order granting the motion and from the judgment of your Honor directed to be entered, plaintiff now gives a notice of appeal to the Circuit Court of Appeals for the Ninth Circuit.

WHEREFORE, complainant prays that said decree be reversed and the District Court be instructed to enter such decree as is prayed for by said bill of complaint conformably with the rules of practice and procedure of this Honorable Court.

GEORGE J. STONEMAN,

E. J. HENNING,

REESE M. LING.

C. A. McGEE,

A. J. MORGANSTERN.

E. E. HENDEE.

Dated at Phoenix, Arizona, September 20th, 1915.

[137]

[Endorsed]: No. E.—20. In the United States District Court, for the District of Arizona. Western Underwriting & Mortgage Company, a Corporation, Complainant, vs. The Valley Bank of Phoenix, a Corporation, et al. Defendants. Assignment of Errors. Filed Sept. 20, 1915. George W. Lewis, Clerk. Service within by Copy. Admitted this 20th day of Sept. 1915. C. F. Ainsworth, Atty. Deft., Valley Bank of Phoenix.

[Endorsed]: No. 2675. United States Circuit Court of Appeals for the Ninth Circuit. Western Underwriting & Mortgage Company, a Corporation, Appellant, vs. The Valley Bank of Phoenix, a Corporation and The Union Bank & Trust Company, a Corporation, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Arizona.

Filed November 4, 1915.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

No. 2675.

# United States Circuit Court of Appeals for the Ninth Circuit.

WESTERN UNDERWRITING & MORT-  
GAGE COMPANY, a Corporation,  
*Appellant,*

vs.

THE VALLEY BANK OF PHOENIX, a  
Corporation, and THE UNION BANK  
& TRUST COMPANY, a Corporation,  
*Appellees.*

BRIEF OF APPELLANT.

Filed

FEB 2 - 1916

F. D. Monaghan

GEORGE J. STONEMAN, Phoenix, Ariz.

E. J. HENNING, San Diego, Cal.

C. A. A. McGEE, San Diego, Cal.

REESE M. LING, Phoenix, Ariz.

A. J. MORGANSTERN, San Diego, Cal.

E. E. HENDEE, San Diego, Cal.

Solicitors for Appellant.





# United States Circuit Court of Appeals for the Ninth Circuit.

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WESTERN UNDERWRITING & MORT-  
GAGE COMPANY, a Corporation,

*Appellant,*

vs.

THE VALLEY BANK OF PHOENIX, a  
Corporation, and THE UNION BANK  
& TRUST COMPANY, a Corporation,

*Appellees.*

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## BRIEF OF APPELLANT.

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## STATEMENT OF CASE.

The Union Bank & Trust Company and the Valley Bank of Phoenix, defendants above named, were, at the time of the institution of this suit, corporations organized under the laws of the State of Arizona, for the purpose of engaging in a general banking business.

On and prior to the 27th day of January, 1912, the Union Bank & Trust Company, finding itself financially embarrassed, entered into a certain contract attached to the Bill of Complaint as Exhibit "A" fully set forth

(*Transcript of Record, Fol. 19*), under and by the terms of which in consideration of the payment by The Valley Bank of all the depositors of the Union Bank, and also all debts and obligations of every kind whatsoever, the Union Bank as signed and delivered to the Valley Bank all of its assets of whatever kind or nature; and it was particularly provided in such contract that such transfer, sale and assignment was made “*absolutely*” and without any reservations or conditions whatsoever, save and except that as between the Valley Bank and certain guarantors, such individuals guaranteed the Valley Bank against loss through this transaction.

Subsequent to the 27th day of January, 1912, to-wit: In the month of February, 1913, (*Transcript of Record, Fol. 5*) complainant, Western Underwriting & Mortgage Company, a corporation, organized under the laws of the State of California, became a stockholder in the Union Bank & Trust Company, to the extent of four hundred and seventy-two (472) shares of the preferred stock, paying therefor assets valued at, approximately, one hundred thousand dollars (\$100,000).

In May, 1913, and while the contract of January 27th, 1912, was in full force and effect, and so far as plaintiff was concerned had been neither modified nor abrogated, and, while the Valley Bank of Phoenix was collecting the assets sold and assigned to it under the terms of said contract; and, as is alleged in the complaint (*Transcript of Record, Fol. 7*), using such collections for its own purposes and on its own account; and, when under the terms of such contract there could have existed no liability on the part of the Union Bank to



the Valley Bank, nor any contingent liability on the part of the individuals made parties to said contract as guarantors of the collections to be made for the Valley Bank, The Union Bank & Trust Company executed and delivered to the Valley Bank its note for one hundred and sixty-four thousand, four hundred and thirty-two dollars (\$164,432); and, thereafter, on the 30th day of December, 1913, and while the contract of January 27th, 1912, had been neither abrogated nor altered, executed a new contract, under the terms of which and upon the assumption that, under the written contract of January 27th, 1912, the Union Bank was indebted to the Valley Bank, for this expressed reason and for the assumed purpose of extinguishing such indebtedness, again transferred all the assets which it had brought together since January 27th, 1912.

The Western Underwriting & Mortgage Company, after demand upon and refusal by the officers and stockholders of the Union Bank, commenced this action to set aside the acts of The Union Bank & Trust Company, in the giving of the note for one hundred and sixty-four thousand dollars (\$164,000), and in the turning over of the assets under the contract of December 30th, 1913, alleging that, in December, 1913, under the terms of the written contract of January 27th, 1912, there could have existed no indebtedness or liability on the part of the Union Bank to the Valley Bank, and that the Valley Bank took the assets under the contract of December 30th, 1913, without consideration.

To this complaint, the Union Bank made no answer, other than the practical admission of the facts alleged in

the Bill of Complaint. The Valley Bank answered, pleading in substance, that, at the time of the execution of the written contract of January 27th, 1912, the Valley Bank and the Union Bank entered into a contemporaneous parol contract by the terms of which the contract of January 27th, 1912, was to be construed as a pledge and not as a sale of the assets mentioned, and that it was not intended that the written contract should embody the verbal agreement, nor that it should contain a release or discharge on the part of the Union Bank to the Valley Bank of any indebtedness caused by any deficiency which would remain upon the collection of the assets taken over by the Valley Bank under the contract of January 27th, 1912, (*Transcript of Record, Fols. 52-54*).

It further pleaded that, pursuant to the terms of the contract of January 27th, 1912, it did pay off and discharge the liabilities of the Union Bank but that it was not intended or contemplated that the Valley Bank should have any interest in the assets delivered by the Union Bank & Trust Company under such contract.

Upon the hearing of this cause in the court below, motion to strike such portions of the answer as attempted to alter, vary or change the terms of the written contract of January 27th, 1912, was by the court denied and judgment entered for defendant, The Valley Bank, upon the theory that the evidence and testimony submitted by plaintiff was not sufficient to sustain the allegations of this complaint or to entitle it to relief prayed for as against the Valley Bank (*Transcript of Record, Fol. 74*). Thereupon petition for allowance of appeal

from the order denying the motion to strike and from the judgment was allowed (*Transcript of Record, Fol. 77*) an appeal perfected by the giving of a bond in the sum of five hundred dollars (\$500) (*Transcript of Record, Fols. 89-90*). |

The execution of the original contract of January 27th, 1912; of the contract of December 30th, 1913; of the note of one hundred and sixty-four thousand dollars (\$164,000) and the delivery to the Valley Bank by the Union Bank, under date of December 31st, of certain assets, return of which is prayed for, are all admitted not only by the answer but by stipulation. (*Transcript of Record, Fol. 45*).

The parol contract alleged to be executed contemporaneously with the contract of January 27th, 1912, is pleaded as an affirmative defense. Plaintiff relies upon the written contract of January 27th, 1912, and submits that for the reasons and upon the authorities hereinafter set forth, the court erred in entering judgment without proof of the substitution for the written contract of January 27th, 1912, of the alleged contemporaneous parol contract of the same date. Except in so far as the evidence may be useful in determining the fact that no testimony was submitted on behalf of defendant, Valley Bank, supporting the alleged contemporaneous parol contract pleaded as an affirmative defense, and, in demonstrating the theory upon which the decree was entered for defendant's motion and without the introduction of any evidence in support of the parol contract, and because the decree recites that the allegations of the complaint were not supported by the evidence, the state-



ment of the evidence may, for the purpose of this appeal, be disregarded.

This appeal is prosecuted for alleged errors as set forth in the following:

## SPECIFICATION OF ERRORS RELIED UPON.

### I.

Because the court erred in denying complainant's motion to strike from the amended answer filed by the Valley Bank certain portions of said amended answer therein attempting to change, alter and modify the terms of the written contract of January 27th, 1912. without showing therefor a new consideration or any consideration and contrary to the rule, as defendant insists, that a written contract, the terms of which are plain and unambiguous, may not be varied, altered or modified by parol. (*Transcript of Record, Fols. 95 to 106, inc.*)

(Because the points involved in this first assignment of errors are included and will be argued in connection with the subsequent errors assigned, the first assignment of errors is not herein set forth at length.)

### II.

That the Court erred in granting the motion of defendant, The Valley Bank of Phoenix, to dismiss the action and the bill of complaint of complainant, upon the grounds assigned in said motion, that complainant Western Underwriting & Mortgage Company had failed to show that the officers of the Union Bank & Trust Company did not have the right to transfer the property described in the bill of complaint to the Valley Bank of Phoenix on December 31st, 1913, in this, to-wit: That

by the ruling of this Honorable Court so made dismissing said bill of complaint, this Court necessarily predicated said ruling upon the presumed existence of a parol contract, alleged by defendant by way of affirmative defense, to have been executed contemporaneously with the written contract of January 27th, 1912, set forth in complainant's bill of complaint, and assumed as true the existence of this parol contract, without proof thereof by defendant that said contract of January 27th was not plain and unambiguous as to its terms, and without proof by said defendant of any new or other consideration for the making of said parol contract so by said defendant pleaded as a defense, and upon which said defendant relied.

### III.

That this Honorable Court further erred in the granting of the motion of The Valley Bank of Phoenix, one of the defendants above named, to dismiss complainant's bill of complaint, for the further reason, that without proof by said defendant of the existence of a parol contract based upon a new consideration, changing and modifying the contract of January 27th, 1912, as set forth in complainant's bill of (*Transcript of Record, Fols. 101-7*) complaint, said defendant could not rely upon the contract of December 30th, 1913, as set forth in complainant's bill of complaint, and such ruling necessarily construed the contract of January 27th, 1912, to be a contract of pledge instead of a contract of sale.

### IV.

That the Court erred in making and entering its decree in favor of the defendants and against the com-

plainant. Said decree being in words and figures as follows, to-wit:

“(Title of Court and Cause.)

The above-entitled cause coming on duly to be tried before the above Court, the Hon. William H. Sawtelle, presiding without a jury, on the 14th day of April, 1915, the complainant appearing by George J. Stoneman, Esq., Attorney and Solicitor, and E. J. Henning, Esq., Attorney and Solicitor; and the defendant, The Valley Bank of Phoenix, appearing by C. F. Ainsworth, its Attorney and Solicitor; and the defendant, The Union Bank & Trust Company appearing by Struckmeyer & Jenckes, Esqs., its Attorneys and Solicitors;

“And the said plaintiff having duly submitted to this Court its evidence and testimony in support of the allegations of its complaint herein, and having duly rested its case,

“And the defendant The Valley Bank of Phoenix having by its attorney and solicitor duly moved this Court for the dismissal of the said action, for the reason that the said plaintiff herein had failed to establish the allegations of said complaint herein, and that the evidence and testimony submitted by said plaintiff was not sufficient to sustain the allegations of its complaint nor to entitle it to any relief as against said defendant The Valley Bank of Phoenix.

“And it appearing to the satisfaction of this Court that the evidence and testimony submitted by the plaintiff was not sufficient to support the allegations of its complaint nor to entitle it to any relief as against the defendant The Valley Bank of Phoenix, and that the motion to dismiss made by said defendant The Valley Bank of Phoenix, should be granted,



“NOW, THEREFORE, IT IS BY THE COURT CONSIDERED ORDERED AND ADJUDGED, that the complaint herein, be and the same is hereby dismissed, and that the plaintiff take nothing by its action; (Transcript of Record, Fols. 102-8).

“IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant The Valley Bank of Phoenix, have and recover of and from the plaintiff The Western Underwriting & Mortgage Company, its costs and disbursements herein, hereby taxed and allowed in the sum of \$81.00, and that said defendant have execution therefor.

“Dated this 14th day of April, 1915.

(Signed) WM. H. SAWTELLE.”

#### ARGUMENT AND AUTHORITIES.

This appeal presents for determination two main questions. It appears, from the pleadings and the statement of facts, that this suit was brought by appellant as stockholder, in behalf of all stockholders similarly situated, against The Union Bank & Trust Company and The Valley Bank of Phoenix, for the purpose of setting aside a certain contract entered into December 30th, 1913, which contract, by its terms, made reference to a previous written contract of January 27th, 1912; such contract, designated as Exhibit 1 of the bill of complaint, is set forth in (*Transcript of Record, Fols. 24, 25, 26 and 27*). This contract recites that, whereas, on the 27th day of January, 1912, The Union Bank & Trust Company and the Valley Bank entered into a contract under date of January 27th, 1912, whereby the Union Bank delivered to the Valley Bank certain assets, in

consideration that the Valley Bank would pay all depositors of the Union Bank, and certain other indebtedness particularly set forth and described; and whereas, the Valley Bank was guaranteed against loss by certain individuals who agreed as guarantors that, if the Union Bank at the end of three years should suffer any loss by reason of the transfer to it of the assets of the Union Bank, they would reimburse the Valley Bank; and whereas, the Valley Bank held the note of the Union Bank for \$164,432.46, dated May 17th, 1913, falling due January 27th, 1915, given by the Union Bank *in liquidation of its indebtedness to the Valley Bank under said contract upon the date of its said execution*; and whereas there remained unpaid *upon said indebtedness* the sum of \$103,000.00, The Union Bank was willing to make a further transfer and assignment of certain assets appearing by said contract to have been acquired by it since the execution of the contract of January 27th, in consideration that the Valley Bank should release the Union Bank from any further claim or liability to it *under the contract of January 27th, 1912*, the Union Bank under this contract of December 30th, 1913, transferred and set over unto the Valley Bank all such other property mentioned in a schedule attached to it and which had been by the Union Bank acquired subsequent to January 27th, 1912.

It is further provided in this contract that, in consideration of such second transfer and assignment (and notwithstanding the reference in this contract to the contract of January 27th, 1912, from which it may be determined there could have existed no indebtedness



from the Union Bank to the Valley Bank), the same guarantors who under the contract of January 27th, 1912, guaranteed the Valley Bank against loss were still to be held.

It is, we think, apparent that under the plain terms of the written contract of January 27th, 1912, not only did there exist no indebtedness from the Union Bank to the Valley Bank after the delivery by it to the Valley Bank unconditionally and absolutely of the assets mentioned in that contract, but that there could have existed no contingent liability on the part of guarantors until January 27th, 1915.

We submit it also is plainly apparent that the Valley Bank must have confessed judgment in this action, except for its allegation set up as an affirmative defense that its right to take over further assets from the Union Bank under the contract of December 30th, 1913, is predicated upon some contract other than the contract of January 27th; this it has attempted to do by pleading a contemporaneous parol contract entered into on the 27th day of January, 1912, which contract, if now permitted to be effective for any purpose, completely nullifies and sets at naught the intent and language of the written contract to the extent of declaring that the written contract did not mean what it said; that it was not an "absolute" sale and transfer of its assets but was instead a pledge, and the creation of an agency on the part of the Union Bank for the collection only of its assets; in fact, it is specially alleged in the affirmative answer of the Valley Bank that, at the time of the execution of the written contract of January 27th, 1912,



there was, so far as this appellant (being a stockholder of the Union Bank) was concerned, and as to all other stockholders, except the guarantors themselves under that contract, an intention that the written contract should not express the true arrangement. (*Folios* 51, 52 and 54). The pleading, in this respect, is, from our point of view, equivalent to an admission that, if under the terms of the written contract, the Valley Bank had made a profitable contract, it should retain for itself the profits, upon the assertion that the contract of January 27th was an absolute and unconditional sale; but that, if it should so happen the Valley Bank had entered into a losing contract, they should be permitted to rely upon a secret, undisclosed and, as to the stockholders of the Union Bank, a fraudulent parol contract completely nullifying the terms of the written contract, whereby the Valley Bank was created the agent only of the Union Bank for the collection of the assets taken over by it from the Union Bank.

It must be assumed that neither the Western Underwriting & Mortgage Company nor any other purchaser of stock in The Union Bank & Trust Company, would have purchased for any consideration, with the knowledge that not only had the assets of the Union Bank been unconditionally sold by the contract of January 27th, but that there was a contingent liability depending upon the want of success on the part of the Valley Bank in reducing its assets to cash; this is particularly true in view also of the fact that, under the terms of the written contract, the Union Bank had no voice in the collection of the assets; it had no equities which it might

enforce; it had no claim against the Valley Bank on account of any profits which might have accrued and, finally, that the Valley Bank protected itself in the transaction against loss, not only by taking over assets of a face value of much more than it would have to pay on account of the indebtedness of the Union Bank, but was guaranteed by individual guarantors against any loss.

We very urgently submit, for the consideration of this court, the further fact that the decree was erroneous in that at the time it was directed upon motion of appellee, the trial court had before it evidence only of the existence of the written contracts and there was absolutely no evidence to support the affirmative defense of a contemporaneous parol contract, without the existence of which it must be conceded the written contract of December 30th, 1913, referring as it does and being predicated upon the terms of the contract of January 27th, was without consideration and as to the stockholders of the Union Bank, void.

For the same reason, we submit that the trial court erred in finding that the officers of the Union Bank, occupying a position of trust towards its stockholders, could either enter into a secret, undisclosed and fraudulent parol contract such as is relied upon as a defense by the Valley Bank, or so construe the plain and unambiguous terms of the written contract of January 27th as to make binding upon the Union Bank or its stockholders the contract of December 30th, 1913.

If it be true, as indicated by the trial court, that the Union Bank is bound by the construction which through

its directors it placed upon the contract of January 27th, then it must follow that the directors, no matter how fraudulent their action may have been, and without regard to the rules of construction of written contracts laid down by the courts, may, for their own purposes or, as in this case, for their own protection, set aside the terms of a plain and unambiguous written contract to the injury of stockholders and others dealing with the company who may have relied upon its terms.

In this connection, attention is directed to the fact that the guarantors, under the written contract of January 27th, being J. F. Cleaveland, John P. Orme, Geo. H. N. Luhrs and J. M. Swetnam, (*Transcript of Record, Fol. 29*) were as to each and all of them at the time of the execution of the contract of January 27th, officers and directors of The Union Bank & Trust Company (*Transcript of Record, Fol. 21*); and to the further fact that such guarantors, who at the time of the execution of the contract of January 27th were officers of the Union Bank, did, by the execution of the contract of December 30th, attempt to relieve themselves of all or a large portion of a contingent liability to the ~~Union~~ *Valley* Bank, determinable only on January 27th, 1915.

We submit that the officers of the Union Bank, acting in the dual capacity of guarantors of the Valley Bank, had no right to use the credit or assets of the stockholders in such a manner and, to permit them so to do, upon the theory that the corporation and stockholders therein may be bound by the construction which its officers for their own protection may, without consideration of the rights of the stockholders, place upon a con-



tract plain and unambiguous in its terms, would be to open wide the door to all directors of all corporations to shift upon the shoulders of stockholders responsibility for individual liability in utter disregard of written representations theretofore made by them in behalf of the company and its stockholders, and upon which all persons, including its stockholders, had a right to rely. From the point of view of the appellee, this was an unconscionable contract, in that it represented facts which did not exist and under which, as before mentioned, the Valley Bank might take advantage of all profits and be protected against all loss.

To what has been said may be added the statement that by the decree complained of, the guarantors of the contract of January 27th, 1912, are permitted by their own act as directors of the corporation to represent to the stockholders, by the execution of the written contract of January 27th, that the corporation had discharged its liability to its creditors and depositors, and, at the same time and by the same act, secretly withdraw this assurance and protect themselves against a contingent liability, which might be determined to exist against them as individual guarantors against loss by the Valley Bank.

Differently stated, the directors of the Union Bank, having the sole control and management of its affairs, voluntarily assuming a possible responsibility for loss arising out of their misconduct, have on the one hand publicly declared that the stockholders were relieved from responsibility arising out of their mismanagement, and secretly agreed between themselves that notwith-

standing, the corporation and its stockholders *should* be held responsible, in complete disregard of their declaration, under the terms of the written contract of January 27th. This, we assert, is not a matter in which the stockholders are bound by the acts of the directors of the corporation, resulting from an erroneous exercise of their discretion, but is a case where it distinctly appears the directors were guilty of a gross misrepresentation in a matter where no discretionary power existed.

We deem it unnecessary to cite authority to the effect that a corporation is bound by the act of its agent or directors only when they act within the scope of their authority. Upon this principle, we assert that the directors of The Union Bank & Trust Company had no express or implied authority as the agents of the corporation to construe a contract, which, upon its face, is a contract of absolute and unconditional sale, to be a contract of pledge or the creation of an agency, as was the effect of the action of the Board of Directors in the execution by it of the contract of December 30th, 1913.

Moreover, the last mentioned contract made no reference to any existing parol contract but was predicated entirely upon the written contract of January 27th, 1912, and upon the unauthorized assumption as readily appears from an inspection of the contract of January 27th, that there existed by the terms thereof a liability fixed or contingent on the part of the Union Bank to the Valley Bank.

The act, we repeat, is not even an instance where the directors have abused their discretion. It is an instance where the directors acted in a matter permitting



the exercise of no discretion. We deem it a very significant fact that, in the attempted acquisition by the Valley Bank of the assets of the Union Bank under the contract of December 30th, reference was made to the written contract of January 27th, 1912, and nowhere, except in the pleadings and not in the contract of December 30th itself, is reference made to or reliance placed upon the provisions of a parol contract to justify the subsequent taking over by the Valley Bank of the assets of the Union Bank; nor is it claimed that the Board of Directors of the Union Bank on the 30th day of December, 1913, justified their action by any knowledge on their part of the existence of a parol contract of the tenor and meaning alleged in the affirmative defense of the Valley Bank. (*Transcript of Record, Fols. 25-28, inc. Q*)

Not only is this true, but the contract of December 30th does not even recite that it is the result of action by the Board of Directors; IT WAS SIGNED BY JOHN P. ORME AS PRESIDENT, WHO IS A GUARANTOR UNDER THE CONTRACT OF JANUARY 27th, WITHOUT RECITATION IN THE CONTRACT OF HIS PURPORTED AUTHORITY.

The warranty of the guarantors is independent of the Union Bank, for it is provided that, in the event the guarantors shall pay any deficiency, the Valley Bank shall re-assign, transfer and deliver to the guarantors all assets not reduced to cash then in the hands of the Valley Bank. (*Fol. 21*).

Finally, and before the citation of authorities, we respectfully suggest the assumption is by no means un-



warranted that, had this case been permitted to proceed to the extent of requiring defendant to prove the existence of the parol contract, appellant might have proven by the guarantors themselves that no such parol contract existed; that the written contract of January 27th was, as is therein expressed in terms, an absolute, unconditional sale by the Valley Bank not coupled with the contemporaneous parol contract and without reservation of any kind. The state of the record only prevents us from asserting this to be a fact. We, therefore, submit that this case should be reversed.

First: Because the decree was rendered in favor of defendant, without proof of the existence of a parol contract, which is the vital and material fact pleaded in defense.

Second: That, even had the attempt been made to prove a parol contract, evidence thereof would have been inadmissible under the rule laid down in the following cases cited as:

#### AUTHORITIES.

The Union Bank is not bound by the fact that the assets transferred to the Valley Bank, under the terms of the written contract, might have been carried upon its books as assets of the Union Bank nor by the fact that the Comptroller may have directed the Union Bank to execute its note in admission of an alleged indebtedness due the Valley Bank, for, if there existed no indebtedness from the Union Bank to the Valley Bank, the directors and officers of the Valley Bank had no right to charge the stockholders with such indebtedness, nor had the Valley Bank or the State Comptroller

the right to create evidence of the indebtedness where none existed.

The evidence of indebtedness from the Union Bank to the Valley Bank must rest upon the alleged parol contract. It becomes necessary, therefore, before any testimony is admissible to show such indebtedness, that the parol contract shall be established, because, except for the parol contract, there existed no indebtedness under the terms of the written contract and the burden is upon the party asserting a modification of a written contract by subsequent or contemporaneous parol agreement to show such modification.

Manning vs. Seaboard Paint Co., 87 N. Y. S. 232;

Boyes vs. Ramsdell, 55 Pac. 538.

Even if this were true, it is part of new matter set up by way of affirmative defense upon which the decree could not be predicated without evidence to support it.

For the convenience of the court and not for the purpose of citing elementary law, we submit herewith what we take to be the rule governing the admission of parol evidence to vary, alter, change or contradict the terms of a written contract:

“The rule has frequently been laid down in the adjudicated cases that no evidence of the language employed by the parties in making the contract can be given in evidence except that which is furnished by the writing itself. It has been seen, however, from the examples already given that in numerous cases much greater latitude has been given to the introduction of parol evidence than is implied in the statement just given. It will be found that nearly all, if not all, the illustrations given in the last section recognize the general rule that the written con-



tract must govern, and that proof of the acts, situation and statements of the parties can have no other effect than to ascertain the meaning of the parties as expressed in the writing. It will also be found that in the cases where evidence of the declarations of parties, has been received the language of the writing admitted of more than one construction, either upon its face or as explained by the parol evidence concerning the surrounding facts or identifying the subject matter or the parties. Where the language of the writing *does* thus admit of more than one construction, there is considerable authority for the view that such language may be construed by the court in the light of the statements and acts of the parties contemporaneous with and subsequent to the contract, in other words, that such language and statement of the parties may be used to explain the ambiguity.

“But it must be borne in mind that, although declarations of the parties may in some cases be received to explain contracts or words of doubtful meaning, yet no other words can be added to or substituted for those of the writing. The courts are not at liberty to speculate as to the general intention of the parties, but are charged with the duty of ascertaining the meaning of the written language. It is no doubt true that, with the aid of the proper extrinsic evidence, instruments are construed and made effective which could not otherwise be construed to have any effect at all; and in these cases a very different construction is given from that which would follow from the bare inspection of the writing. But the court cannot give effect to any intention which is not expressed by the language of the instrument, when examined in the light of facts that are properly before the court. For still stronger reason such evidence cannot be received to contradict the clear and settled meaning of the contract. And it is only in exceptional cases that the statement at the time of execution of the contract



and prior negotiations between the parties will be received.”

Jones on Evidence, Edition De Luxe; p. 571, Par. 454;

Farmers Loan & Trust Co. v. Commercial Bank of Racine, 15 Wis. 424, 82 Am. Dec. 689;

Jones v. Swearingen, 42 S. C. 58;

Naughton v. Elliott, 68 N. J. Eq. 259; 59 Atl. 869;

McAfferty v. Conover, 7 Oh. St. 99; 70 Am. Dec. 57;

Griffin v. Hall, 115 Ala. 482; 22 So. 162.

Matters which appear in the writing, not to be excluded by parol evidence;

Lawrence v. Comstock, 124 Mich. 120; 82 N. W. 808;

King v. New York & Cleveland Gas Coal Co., 204 Pa. St. 628; 54 Atl. 477;

The Delaware, 14 Wall. 579;

Gilbert v. Moline Plough Co., 119 U. S. 491;

Corse v. Peck, 102 N. Y. 513;

Elofrson v. Lindsay, 90 Wis. 203; 63 N. W. 98.

See many cases cited, 9 Encyc. of Ev. 375-377.

The rule is more forcibly laid down and has been the subject of more frequent construction in cases involving parol representations antecedent to or contemporaneous with the execution and delivery of policies of insurance.

See Northern Assurance Co. vs. Grandview Bldg. Association, 183 U. S. 308; 46 L. Ed. 213-23;

Conn. Fire Ins. Co. vs. Buchanan, 141 Fed. C. C. A. 877; 4 L. R. A. (N. S.) 758.

An instructive case, with a very extensive note, is found in the case of

Haapa vs. Metropolitan Life Insurance Co., 150

Mich. 467; 114 N. W. 380; 16 L. R. A. (N. S.)  
1165.

The answer of Valley Bank containing no set-off or counter-claim under Equity Rule No. 31, the new or affirmative matter therein is deemed denied.

Respectfully submitted,

GEORGE J. STONEMAN, Phoenix, Ariz.

E. J. HENNING, San Diego, Cal.

C. A. A. McGEE, San Diego, Cal.

REESE M. LING, Phoenix, Ariz.

A. J. MORGANSTERN, San Diego, Cal.

E. E. HENDEE, San Diego, Cal.

Solicitors for Appellant.

Dated at Phoenix, Ariz., February 1st, 1916.

Service three copies admitted February 1st, 1916.

C. F. AINSWORTH,

Solicitor for Appellee,

Valley Bank of Phoenix.

IN THE  
United States  
Circuit Court of Appeals  
For the Ninth Circuit

WESTERN UNDERWRITING &  
MORTGAGE COMPANY, a Cor-  
poration,

*Appellant.*

vs.

THE VALLEY BANK OF PHOE-  
NIX, a Corporation, and THE  
UNION BANK AND TRUST  
COMPANY, a Corporation,

*Appellees,*

Filed

FEB 11 1916

F. D. Monckton

Clerk

Brief of Appellee

C. F. AINSWORTH,  
Phoenix, Arizona.

JOS. H. KIBBEY,  
Phoenix, Arizona.

Solicitors for Appellee,  
The Valley Bank of Phoenix.





*United States Circuit Court of Appeals for the Ninth  
Circuit.*

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WESTERN UNDERWRITING &  
MORTGAGE COMPANY, a Cor-  
poration, *Appellant.*

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THE VALLEY BANK OF PHOE-  
NIX, a Corporation, and THE  
UNION BANK AND TRUST  
COMPANY, a Corporation,  
*Appellees,*

---

BRIEF OF APPELLEE

STATEMENT OF CASE.

This is an action by the appellant, a California corporation, against the appellees, two Arizona corporations, to have adjudged fraudulent and void that certain contract bearing date the 30th day December, 1913, made by and between the appellees herein and set out in full (at pages 31-35, Transcript of Record) except the Schedule A, and to recover of the Appellee, the Valley Bank of Phoenix, the property set out in said Schedule A or its value. Also to have adjudged fraudulent and void that certain promissory note bearing date May 13th, 1913, executed by the Appellee, The Union Bank and Trust Company to the Valley Bank of Phoenix for \$164,432.46, being the same note mentioned and described in said contract of December 30, 1913 above referred to. The appellant alleges as jurisdictional facts authorizing it to maintain this action in the court below

that it is the owner of 472 shares of preferred stock in the said Appellee, the Union Bank and Trust Company, and that said preferred stock has no voting power, that the fraudulent and void actions taken by the voting stockholders of the common stock of the said Union Bank and Trust Company and the Directors thereof, has made the preferred stock of the Appellant and others similarly situated valueless. (Transcript of Record, folio 13, page 17.) That the appellant had, prior to bringing this action, made written demand on the representatives of the appellee, The Union Bank and Trust Co., to bring appropriate proceedings against the Valley Bank of Phoenix to recover the property transferred to it by said contract of Dec. 30, 1913, and the cancellation of said \$164,432.46 note, that said officers had refused to bring such action, and that it would be useless to apply to the stockholders of the common stock to have such action brought, for the reason that one W. L. Rosa, the owner of a majority of the voting common stock, would, if a stockholders' meeting was called for the purpose of instructing the directors of The Union Bank and Trust Company to bring such action that said Rosa would vote against said resolution (Transcript of Record, folio 14, pages 18 and 19). The appellant alleges the making of the contract of January 27, 1912, between the appellees and the sureties therein mentioned, set out in full (Transcript of Record, folios 19-20-21, pages 25 to 28), and its construction of the same. Also the making of the contract of Dec. 30, 1913, between the appellees, and the making of the note in said contract set forth, and its construction of the same. The answer of the appellee, The Valley Bank of Phoenix, admits the making of the two contracts set out in the Bill of Complaint, also the making of the note by the appellee, The Union Bank and Trust Company, set out in the bill of complaint, and specifically denies all the other allegations of the bill of complaint, and then sets forth the



construction of said contracts by the respective parties thereto and their operation thereof. Alleges an accounting between the appellees in the month of May, 1913, on the contract of January 27, 1912, and that in such accounting there was then found unpaid and owing to The Valley Bank of Phoenix from The Union Bank and Trust Co. the sum of \$164,432.46, and which amount would be due and payable on January 27, 1915, and thereupon a note for said amount was given by the Union Bank and Trust Co. to The Valley Bank of Phoenix. It also alleged the payment of all the debts it had agreed to pay by said contract of January 27, 1912, and at the time of filing said answer, to-wit: February 23, 1915, there was due and unpaid to this appellee, The Valley Bank of Phoenix, in accordance with the terms of said contract of January 27, 1912, from the guarantors and sureties thereon the sum of \$79,774.97. (Transcript of Record, folios 50 to 63, pages 63 to 77.) At the close of appellant's case on the trial thereof, the Court rendered the following judgment:

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(Title of Court and Cause.)

The above entitled action coming on duly to be tried before the above court, the Hon. William H. Sawtelle, presiding without a jury, on the 14th day of April, 1915, the complainant appearing by George J. Stoneman, Esq., attorney and solicitor, and E. J. Henning, Esq., attorney and solicitor; and the defendant, The Valley Bank of Phoenix, appearing by C. F. Ainsworth, Esq., its attorney and solicitor; and the defendant, The Union Bank and Trust Company, appearing by Struckmeyer & Jenckes, Esqs., its attorneys and solicitors; and the said plaintiff having duly submitted to this court its evidence and testimony in support of the allegations of its complaint herein, and having duly rested its case, and the

defendant, The Valley Bank of Phoenix, having by its attorney and solicitor duly moved this court for the dismissal of the said action, for the reason that the said plaintiff herein had failed to establish the allegations of said complaint herein, and that the evidence and testimony submitted by said plaintiff was not sufficient to sustain the allegations of its complaint nor to entitle it to any relief as against the said defendant, The Valley Bank of Phoenix, and it appearing to the satisfaction of this court that the evidence and testimony submitted by the plaintiff was not sufficient to support the allegations of its complaint nor to entitle it to any relief as against the defendant, The Valley Bank of Phoenix, and that the motion to dismiss made by said defendant, The Valley Bank of Phoenix, should be granted,

NOW THEREFORE,

It Is by the Court Considered Ordered and Adjudged, that the complaint herein, be and the same is hereby dismissed, and that the plaintiff take nothing by its said action;

It Is Further Ordered, Adjudged and Decreed that the defendant, The Valley Bank of Phoenix, have and recover of and from the plaintiff, The Western Underwriting & Mortgage Company, its costs and disbursements herein, hereby taxed and allowed in the sum of \$81.10, and that said defendant have execution therefor.

Dated, this 14th day of April, 1915.

WM. H. SAWTELLE,  
Judge of the District Court of the United  
States, in and for the District of Arizona.

---

#### ARGUMENT AND AUTHORITIES.

The appellee, The Valley Bank of Phoenix, will con-

sider the errors assigned by the appellant under two heads.

### First.

The error assigned by appellant that the trial Court erred in denying complainant's motion to strike from the amended answer of The Valley Bank certain portions thereof as set forth (Transcript of Record, folios 95 to 106 inc.).

### Second.

The error assigned by appellant "that the trial Court erred in entering its decree in favor of the defendants and against the complainant, as therein before set forth.

The trial Court, in denying the appellant's motion to strike from the amended answer of The Valley Bank those portions referred to in appellant's first assignment or errors herein, thereafter on the trial stated his views of the contract of January 27, 1912, as follows: "It seems to me from the discussion that was had when the demurrers were argued, or rather the motion to strike was argued, the construction and the opinion that I got at that time from the reading of the contract originally entered into, the one of January 27, 1912, that it might well be construed as the parties afterwards did construe it,—that is to mean a security for a debt. It is most unusual for a person who buys property, notes and securities outright, to take one as a guarantee for them, guaranteeing the purchaser against loss, and it seems to me if this case were to proceed that the defendant would be allowed to introduce testimony to show what the real transaction and agreement was. But aside from that, I am of the opinion that in this case the plaintiff corporation, in entering into the contract of December 30, 1913, as it had a right to do, recognized the transaction, the original transaction as a security for an indebtedness, and that the stockholders of the corporation, including the plaintiff who sues on its behalf, are bound



by that contract." (Transcript of Record, folios 41-42, page 160.)

We submit that the contract of January 27th, 1912, shows upon its face that the assets therein transferred to The Valley Bank of Phoenix were transferred as security in connection with the guarantee of the directors of The Union Bank and Trust Company, in their individual capacity to make good to the Valley Bank any deficiency it might sustain by reason of its inability to realize on the securities turned over to it by The Union Bank and Trust Company, sufficient money to repay the Valley Bank the amount it paid to the creditors of said Union Bank and Trust Company. There are three parties to this contract, The Union Bank and Trust Company and its guarantors on the one side, and The Valley Bank on the other. The Union Bank and Trust Company transferred, assigned, delivered and set over to The Valley Bank certain property to-wit: Cash, negotiable paper, bonds, stocks, etc., and the directors personally guaranteed to pay to The Valley Bank of Phoenix any deficiency which should remain at the end of three years from January 27, 1912, unpaid, after applying all of the cash received and collected, and all securities collected and reduced to cash upon the amount of the *indebtedness* of the party of the first part (viz: The Union Bank and Trust Company), which said party of the third part (viz: The Valley Bank) has paid or will be obliged to pay under the terms of the compact; and said second parties agreed to *repay* to said Valley Bank all costs and expenses which said Valley Bank should incur in reducing said assets to cash or in collecting the moneys due on such securities and evidences of indebtedness as are collectible. (Transcript of Record, folios 19-20, page 26.) On the other hand, The Valley Bank, in consideration of the *delivery to it of the assets*, and the execution of the agreement by The Union Bank and Trust Company and the guarantors, agreed to

pay all of the specified debts, as were designated in an Exhibit A, and in case of a deficiency being paid by the guarantors or any of them, to The Valley Bank, then it would re-assign to such guarantors all of the assets in its hands that had not been reduced to cash. (Transcript of Record, folio 21, page 27).

It seems clear from the language used in that part of the contract of the guarantors, in which they expressly describe their *guaranty* for the *payment of an indebtedness* of their principal, The Union Bank and Trust Company, which The Valley Bank shall pay under the terms of said contract, that The Union Bank and its directors as guarantors were securing The Valley Bank *absolutely* for all moneys it should pay out in liquidation of The Union Bank's indebtedness under the terms of said contract. There never was any doubt in the minds of the officers and directors of either The Union Bank and Trust Company or of The Valley Bank of Phoenix as to the purpose and meaning of the contract of January 27, 1912.

The officers and directors of The Union Bank and Trust Co., all of which officers and directors, except John P. Orme, were different from the officers and directors of The Union Bank at the time of the making of the contract of January 27, 1912, did on December 30, 1913, by contract in writing, in pursuance of a resolution of its board of directors, duly given and adopted at a meeting called for that purpose, construe said contract of January 27, 1912, and stipulated that, at that time there was an indebtedness from the Union Bank and Trust Co. to The Valley Bank under said contract of January 27, 1912, of \$103,000.00, which would exceed the probable value of the securities then held by said Valley Bank under said agreement of January 27, 1912, in the estimated sum of \$75,000.00. (Transcript of Record, folios 24 to 28 inc., pages 31 to 35.)

We therefore submit that the trial Court was correct



in denying appellant's motion to strike out portions of The Valley Bank's answer specified in appellant's error No. One, and in support of the trial Court's ruling we submit the following authorities:

Jones on Evidence, Pocket Edition, Sec. 446 and 447.

Peugh vs. Davis, 96 U. S. 332-336.

Brick vs. Brick, 98 U. S., 514-516.

Bunyan vs. Siligman, 107 U. S., 20-32.

Cabera vs. American Colonial Bank, 214 U. S., 224 on 230-231.

The above authorities state the rule as follows: "It has long been the settled rule that in courts exercising equitable jurisdiction it is admissible to prove by parole that instruments in writing apparently transferring the absolute title are in fact only given as security. The intention of the parties must govern ; and it matters not what peculiar form the transaction may have taken, the inquiry always is was a security for the loan of money or other property intended. In arriving at the real intention of the parties, their statements and acts at the time of the transaction, the prior existence of a debt, and the recognition of its continuance, as by the payment of the interest or other acts, are all facts to be considered and are relevant to the issue." From the foregoing authorities it must be apparent to this court that all of the allegations attempted to be stricken out were properly pleadable for the reason that they were allegations showing the real intention of the parties at the time said contract of Jan. 27, 1912, was entered into and the purpose for which said contract was executed.

We will consider Complainant's Assignment of Error, that the Trial Court erred in holding that the evidence and testimony submitted by the plaintiff was not sufficient to support the allegations of its complaint, nor to entitle it to any relief as against the defendant, The Valley Bank of Phoenix, and rendering judgment dis-

Morgan's vs. Shinn, 15 Wall. 105;  
Sawyer vs. Turpin, 91 U. S. 114 on 119;  
Hughes vs. Edwards, 9 Wheaton, 489 on 495.



missing the bill of complainant, and that the Valley Bank recovering the complainant's costs and disbursements.

This is a suit by the corporation, The Union Bank and Trust Company, although brought in the name of the complainant alleged stockholders, because the corporation refused to bring the suit.

The principal evidence introduced by the appellant in the trial court, that we will consider is that of the witness Sidney H. Stewart, who certified to certain prices of property including the Union Bank furniture and fixtures, and securities that were turned over to the Valley Bank under both contracts, that the officers of the Union Bank after the contract of Jan. 27, 1912, assisted in reducing the securities turned over to the Valley Bank to cash, that the officers of the Union Bank always contended it was to their interest to get the notes liquidated and cut down its indebtedness as quickly as possible, that the officers of the Union Bank and Valley Bank held meetings and went over the assets at various times, that at the time of the trial of this action (which was subsequent to the 3-year expiration of the Jan. 27, 1912, contract) The Valley Bank had converted \$364,631.67 of assets and paid out \$430,783.59. That the furniture and fixtures was put up as collateral the same as the notes and securities. (Transcript of Record, folios 106 to 111, inc., pages 126-132).

All of the other evidence in the record tends to show that the complainants were not the owners of any common stock of The Union Bank and Trust Company. Also their endeavors to have the corporation bring this suit.

The evidence of Sidney H. Stewart clearly establishes, first, that the cash and security turned over to the Valley Bank by the Union Bank under contract of Jan. 27, 1912, was turned over and received by the Valley Bank as security and that both parties to that contract, from the date thereof so treated such security;

second, that at the expiration of said contract of Jan. 27, 1912, there was due the Valley Bank as per the terms of said contract a deficiency of \$66,151.92; third, that after the application of all the assets by the Valley Bank turned over to it under contract of Dec. 30, 1913, there would still remain a deficiency of about \$36,000 due it under the contract of Jan. 27, 1912.

The question is who is to pay the Valley Bank this deficiency, we say, first the Union Bank must pay it to the extent of the property it turned over under the contract of Jan. 27, 1912, and the property turned over to the Valley Bank under contract of Dec. 30, 1913, and then, and not until then, the guarantors will be obligated to pay the Valley Bank such deficiency as then may be after the application of all of said securities, (In this connection I may be permitted to state that on account of the bringing of this suit none of the assets turned over under the contract of Dec. 30, 1913, have been applied by the Valley Bank to the payment of the deficiency due it.)

If it be claimed by the appellant that the guarantors are the parties to pay this deficiency to the Valley Bank, then and in that event such guarantors would have the right to recover of their principal, the Union Bank, out of any property it might have, sufficient to indemnify them to the extent of their liability, and the directors of the Union Bank and Trust Company, realizing as they did on Dec. 30, 1913, that there was sure to be a deficiency of a large amount to be paid the Valley Bank under the contract of Jan. 27, 1912, they as such directors not only had the right but it was their duty as officers of the Union Bank, to turn over to the Valley Bank as further security, the assets which they did turn over under the contract of Dec. 30, 1913, and the Valley Bank having received such securities it is its duty to apply the same as designated in the contract of Dec. 30, 1913, for the protection of the sureties and guarantors.

The appellant's evidence in the record further shows, after applying all the assets and securities for which this action is brought, at their face value, there will still remain a *deficiency due the Valley Bank under both contracts of over \$36,000*. We respectfully submit that the real complainant herein, The Union Bank and Trust Company, cannot under any theory of this case, recover of The Valley Bank of Phoenix, the securities turned over to it under the contract of December 30, 1913, until it has first repaid the Valley Bank the deficiency due it on account of the debts of said Union Bank and Trust Company, paid by said Valley Bank under said contract of January 27, 1912.

We also submit that the bill of complaint does not state facts sufficient to constitute a cause of action against the appellee, The Valley Bank, for the reason that it appears on the face thereof that after applying all the money received and to be received from the assets turned over to the Valley Bank of Phoenix under both contracts, set out in the bill of complaint for the purposes therein specified, there would still be a deficiency due the Valley Bank of over \$36,000, as per the terms of said contracts. That the complainant could not recover any of said assets for which this suit was brought until the Valley Bank had been repaid the deficiency then due it, which, exclusive of the value of assets turned over to it under contract of December 30, 1913, is alleged in the bill of complaint to be \$75,000.

The contention of the appellants that the Valley Bank was going to make a profit out of the assets turned over to it under contract of January 27, 1912, seems to us unwarranted, when it is so clearly apparent from said contract that all the parties to said contract therein conceded there was to be a deficiency. That one of the guarantors, John P. Orm, the vice president of the Union Bank and Trust Co., in said contract limited his liability to \$5,000. At this proportion for the four guar-



antors there was a conceded deficiency and liability of \$20,000 and it was probably on this account that it was provided that the remaining assets not converted should be returned to the guarantors paying such deficiency.

The appellant's contention as to why the Western Underwriting & Mortgage Company should purchase preferred stock in the Union Bank and Trust Company, we are not advised, for there is no evidence in the record on this subject, and in this connection we also submit that there is not sufficient evidence in this record to authorize this complainant to bring or maintain this action against this appellee, The Valley Bank of Phoenix.

The trial court very properly held at the close of plaintiff's case that irrespective of whether or not there was a contemporaneous parol agreement at the time of making the contract of January 27th, 1912, that the real complainant herein, The Union Bank and Trust Company, having in writing construed that contract on two different occasions, viz: when it executed and delivered to the Valley Bank of Phoenix its promissory note for \$164,432.46, dated May 17, 1913. Also when it executed the contract of December 30, 1913, that in both instances it construed the contract of January 27, 1912, to be a security contract of The Union Bank and Trust Company to The Valley Bank of Phoenix, for the payment by the Valley Bank of the debts of said Union Bank in said contract specified. That the Union Bank had the right to construe that contract as it was actually intended to be and having done so, both the Union Bank and its stockholders are bound by that construction.

We therefore submit that on the record in this case the judgment of the trial court should be affirmed.

Respectfully submitted,

C. F. AINSWORTH,

Phoenix, Arizona.

JOS. H. KIBBEY,  
Phoenix, Arizona.

Solicitors for the Appellee, The  
Valley Bank of Phoenix.

Dated Phoenix, Ariz., Feb. 9, 1916.

Service three copies admitted Feb. 9, 1916.

GEORGE J. STONEMAN,  
Phoenix, Arizona.  
Solicitor for Appellant.





X

**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

---

M. F. HALL,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

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**Transcript of Record.**

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Upon Writ of Error to the United States District Court  
of the Territory of Alaska, Fourth Division.

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**Filed**

FEB 10 1916

**F. D. Monckton,**

**Clerk.**

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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M. F. HALL,

Plaintiff in Error,

vs.

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Defendant in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District Court  
of the Territory of Alaska, Fourth Division.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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**Names and Addresses of Attorneys of Record.**

R. F. ROTH, Attorney for Plaintiff and Appellee,  
Fairbanks, Alaska.

LEROY TOZIER, Attorney for Defendant and Appellant,  
Fairbanks, Alaska. [1\*]

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*In the District Court for the Territory of Alaska,  
Fourth Division.*

No. 689—CR.

UNITED STATES OF AMERICA,  
Plaintiff,  
vs.

M. F. HALL,  
Defendant.

**Praecipe for Transcript of Record.**

The Clerk of the court will please prepare and certify a copy of the record in this action as follows:

1. The indictment.
2. The bill of exceptions complete.
3. All journal entries connected with the trial, including the final judgment.
4. All papers connected with the writ of error, except the writ of error, the citation, order or orders extending time in which to file transcript in the Appellate Court, and the stipulation, if any, in regard to printing record. The last-mentioned papers, being entitled in said Appellate Court, are to be forwarded to and filed there.

LEROY TOZIER,  
Attorney for Defendant.

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\*Page-number appearing at foot of page of original certified Record.

Service and receipt of copy admitted this 5th day of October, 1915.

R. F. ROTH,  
United States District Attorney.

[Endosed]: In the District Court Territory of Alaska, Fourth Division. United States of America v. M. F. Hall. Praeipe for Transcript of Record. Filed in the District Court, Territory of Alaska, 4th Div. Oct. 5, 1915. J. E. Clark, Clerk. By Sidney Stewart, Deputy. [2]

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[Caption of Appellate Court and Title.]

**Stipulation as to Printing Record.**

It is stipulated between the attorneys for the parties respectively, that in printing the record in this case for use in the said court, all captions should be omitted after the title of the cause has been once printed, and the words "Caption and Title" and the name of the paper or document should be substituted therefor; also that after printing the indorsements and file-marks on the indictment, bill of exceptions, record in the Appellate Court, the indorsements other than file-marks on all other papers should be omitted, and the word "Indorsements" printed in lieu thereof.

All other parts of the record should be printed.

Dated October 6 1915.

LEROY TOZIER,  
Attorney for Plaintiff in Error.

R. F. ROTH,  
United States District Attorney,  
For Defendant in Error.



[Indorsed]: Filed in U. S. District Court, Oct. 6, 1915. [3]

[Caption and Title.]

**Indictment.**

M. F. HALL is accused by the Grand Jury of the Territory of Alaska, Fourth Division, convened at Fairbanks for the March term of the District Court, in the year of our Lord one thousand nine hundred and fifteen, by this indictment of the crime of assault, committed as follows, to wit:

That the said M. F. Hall, on the 24th day of September, A. D. 1914, at the town of Fairbanks, in the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, and within the jurisdiction of this court, not being armed with a dangerous weapon, did then and there unlawfully assault one, Selma Lappi, by then and there unfastening some of the underclothing of the said Selma Lappi and then and there placing his hand upon the private parts of the body of the said Selma Lappi, the said Selma Lappi being then and there a female child of the age of nine years and he, the said M. F. Hall, being then and there a male person over the age of twenty-one years, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Dated at Fairbanks in the Division and Territory

aforesaid this 19 day of March, A. D., 1915.

R. F. ROTH,

United States Attorney.

By \_\_\_\_\_,

Assistant U. S. Attorney.

———A true bill.

J. D. REAGH,

Foreman.

The following witnesses were examined before the Grand Jury upon the finding of the foregoing indictment:

MRS. JOHN LAPPI,

SELMA LAPPI. [4]

[Indorsed]: No. 689—Cr. In the District Court for the Territory of Alaska. United States of America, Plaintiff, vs. M. F. Hall, Defendant. Indictment for the Crime of Assault. A true bill. Secret. Presented to the Court by the foreman of the Grand Jury in open Court in the presence of the Grand Jury, and filed in the District Court, Territory of Alaska, Fourth Division. Fairbanks, Alaska, March 19, 1915. Angus McBride, Clerk. By P. R. Wagner, Deputy. Filed in the District Court, Territory of Alaska, 4th Div. March 19, 1915. Angus McBride, Clerk. [5]

---

[Caption and Title.]

General March, 1915, Term. Friday, March 19, 1915. Sixteenth Court Day.

**Order for Bench Warrant.**

The Grand Jury having on this day returned in-

dictment against the above-named defendant, for the crime of assault, now, upon application of R. F. Roth, United States Attorney;

IT IS ORDERED that the clerk of this court issue a bench warrant for the arrest of the said defendant and that bail be, and the same is, hereby fixed at Five Hundred Dollars (\$500).

CHARLES E. BUNNELL,  
District Judge.

Entered in Court Journal No. 13, page 81. [6]

---

[Caption and Title.]

**[Bail] Bond.**

An indictment having been found on the 19th day of March, 1915, in the District Court for the Territory of Alaska, Fourth Div., charging M. F. Hall with the crime of assault and he having been duly admitted to bail in the sum of Five Hundred Dollars.

We, H. L. Hedger, of Fairbanks, Alaska, by profession, a dentist and W. Frank Whitely of the same place by occupation, a broker, hereby undertake that the above-named M. F. Hall will appear and answer the above-named charge in whatever court it may be prosecuted and shall at all times render himself amenable to the orders and process of the Court and if convicted shall appear for judgment and render himself in execution thereof or if he failed to perform either of those conditions we will pay to the United States the sum of Five Hundred Dollars.

H. L. HEDGER,  
W. F. WHITELEY. [7]



United States of America,  
Territory of Alaska,—ss.

H. L. Hedger and W. Frank Whitley, being first duly sworn, on oath, each for himself, says that he is a resident of the Territory of Alaska; that *he not* a marshal, deputy marshal, commissioner, clerk of the court or other officer of any court and that he is worth the sum of Five Hundred Dollars over and above all his debts and liabilities and exclusive of property exempt from execution.

H. L. HEDGER,  
W. F. WHITELEY.

Subscribed and sworn to before me this 19th day of March, 1915.

[Seal]

T. A. MARQUAM,  
Notary Public for Alaska,

My commission expires Dec. 20, 1918.

The foregoing bond is approved this 19th day of March, 1915.

CHARLES E. BUNNELL,  
District Judge.

[Endorsed]: Filed March 19, 1915. [8]

---

[Caption and Title.]

General March, 1915 Term. Friday March 19, 1915.  
Sixteenth Court Day.

**Order Approving [Bail] Bond.**

Now at this time, the bail bond in the above-entitled cause being presented in open court by T.

A. Marquam, attorney for the defendant and R. F. Roth, United States Attorney, not objecting to the sureties thereon,

IT IS ORDERED that the said bond be, and the same is, hereby approved.

CHARLES E. BUNNELL,

District Judge.

Entered in Court Journal No. 13, page 81. [9]

---

[Caption and Title.]

**Order of Discharge of Defendant from Custody.**

To the United States Marshal, Fourth Division,  
Alaska,

M. F. Hall, the above-named defendant, whom you have in your custody upon a charge of assault having given sufficient bail to answer the same, you are hereby directed to forthwith discharge him from your custody.

Dated at Fairbanks, Alaska, this 19th day of March, 1915.

CHARLES E. BUNNELL,

District Judge.

Entered in Court Journal No. 13, page 81.

[Endorsed]: Filed March 19, 1915. [10]

---

[Caption and Title.]

General March, 1915 Term. Friday March 19, 1915.  
Sixteenth Court Day.

**Order Setting Time for Arraignment.**

An indictment having been presented by the

Grand Jury against the defendant herein, charging him with the crime of assault,

IT IS ORDERED that the said defendant be, and appear in open court for arraignment on Monday, March 22, 1915, at 10:00 A. M.

CHARLES E. BUNNELL,

District Judge.

Entered in Court Journal No. 13, page 81. [11]

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[Caption and Title.]

General March, 1915, Term. Monday, March 22, 1915.

**Arraignment.**

Now, on this day, came the United States Attorney, R. F. Roth, came also the defendant in person and being represented by his attorney, T. A. Marquam, and this being the time set for the arraignment of said defendant, he was brought to the bar of this court, and being asked if he is indicted by his true name, and answering that he is, the indictment herein was read to the defendant by the clerk of the court, under the direction of the Court, and a copy of said indictment including a list of the witnesses appearing before the Grand Jury for the purpose of this indictment being delivered to him; whereupon the Court set Wednesday, March 24, 1915, at 10:00 A. M., as the time for defendant to enter his plea herein.

CHARLES E. BUNNELL,

District Judge.

Entered in Court Journal No. 13, page 84. [12]



[Caption and Title.]

**Demurrer.**

Comes now the defendant and demurs to the indictment herein for the following reasons, to wit:

(I)

That said indictment does not substantially conform to the requirements of Chapter Seven, Title XV of the code of criminal procedure for Alaska, in that:

(a) The said indictment does not contain a statement of the facts constituting the alleged offense attempted to be charged therein, in ordinary and concise language and in such a manner that a person of common understanding is enabled to understand what was intended.

(b) That the indictment is not direct and certain as it regards the crime charged.

(c) That said indictment is not direct and certain as it regards the particular circumstances of the crime attempted to be charged.

(II)

That the facts stated in said indictment do not constitute a crime.

T. A. MARQUAM,

Of Counsel for Defendant. [13]

SERVICE of the foregoing demurrer admitted and a true copy thereof received this 24th day of March, 1915.

R. F. ROTH,

Attorney for Plaintiff.

[Indorsed]: Filed March 24, 1915. [14]

[Caption and Title.]

General March, 1915, Term. Wednesday, March 24,  
1915. Twentieth Court Day.

**Order Overruling Demurrer.**

Now, on this day, came on for hearing defendant's demurrer to the indictment herein, the defendant appearing in person and with his attorney, T. A. Marquam; R. F. Roth, United States Attorney, appearing in behalf of plaintiff, and said demurrer being submitted without argument, and the Court being fully and duly advised in the premises.

IT IS ORDERED that said demurrer be, and the same is hereby overruled.

CHARLES E. BUNNELL,

District Judge.

Entered in Court Journal No. 13, page 90. [15]

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[Caption and Title.]

General March, 1915, Term. Wednesday, March 24,  
1915. Twentieth Court Day.

**Plea of not Guilty.**

Now, on this day, came the United States Attorney, R. F. Roth, came also the defendant in person and being represented by his attorney, T. A. Marquam, defendant having on a prior day of this term been duly indicted and arraigned, and this being the time set for said defendant to enter his plea herein, and now being asked by the Court if he is guilty or not guilty of the crime charged against him in the indictment, namely, that of "Assault," to which the de-

fendant pleads that he is "Not Guilty," and therefore puts himself upon the country and the United States Attorney for and in behalf of the Government doth the same,

CHARLES E. BUNNELL,

District Judge.

Entered in Court Journal No. 13, page 90. [16]

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[Caption and Title.]

General March, 1915, Term. Wednesday, March 24, 1915. Twentieth Court Day.

**Order Continuing Matter of Setting Cause for Trial.**

Now at this time, the defendant, by his attorney T. A. Marquam, moves the Court that the matter of setting the above-entitled cause for trial be continued, R. F. Roth, United States Attorney, not objecting thereto,

IT IS ORDERED that the matter of setting said cause for trial be, and the same is hereby continued until Monday, March 29, 1915, at 10:00 A. M.

CHARLES E. BUNNELL,

District Judge.

Entered in Court Journal No. 13, page 90. [17]

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[Caption and Title.]

General March, 1915, Term. Monday, March 29, 1915. Twenty-fourth Court Day.

**Order Setting Cause for Trial [on April 10, 1915].**

Now on this day, this being the time for setting



said cause for trial, R. F. Roth, United States Attorney appearing in behalf of plaintiff, T. A. Marquam, in behalf of defendant;

And it is now ORDERED that said cause be, and the same is, hereby set for trial April 10, 1915, at 10:00 A. M.

CHARLES E. BUNNELL,  
District Judge.

Entered in Court Journal No. 13, page 100. [18]

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[Caption and Title.]

General March, 1915, Term. Saturday, April 10,  
1915. Thirty-fifth Court Day.

**Order Setting Cause for Trial [After Case No. 665].**

Now on this day, IT IS ORDERED, that the trial of above-entitled cause be, and the same is hereby set for trial to follow the trial of Cause No. 665—Cr., United States of America vs. Katie Pinchetti.

CHARLES E. BUNNELL,  
District Judge.

Entered in Court Journal No. 13, page 114. [19]

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**[Minutes of Trial, April 16, 1915.]**

[Caption and Title.]

General March, 1915, Term. Friday, April 16, 1915.  
Fortieth Court Day.

**TRIAL BY JURY.**

Now on this day, this cause came on regularly for trial by jury, R. F. Roth, United States Attorney, appearing for and on behalf of plaintiff, the defend-

ant appearing in person and by his attorneys, T. A. Marquam and M. E. Stevens, and both sides announcing themselves ready for trial, the following proceedings were had, to wit:

On the Court's own motion, and there being no objections on the part of the prosecution or defense, the Court ordered, that all such persons of the general public not properly having business before the Court, be excluded from the courtroom during the trial of this cause.

Thereupon the clerk proceeded to withdraw from the trial jury-box, one at a time, the ballots containing the names of the members of the regular panel of petit jurors, and the respective attorneys examined said jurors and exercised their challenges against said jurors so drawn, said jurors so drawn to try the issues in this cause being as follows, to wit:

H. Buzby, John Perlenda, Ed Hering, A. W. Van Sant, James Kirk, P. J. Wenn, Daniel Jacobson,

Thereupon John Solen and S. T. Kincaid, were duly sworn as bailiffs during the formation of the jury and the pendency of the trial.

Further proceedings were continued until 2:00 P. M. this day.

CHARLES E. BUNNELL,

District Judge.

Entered in Court Journal No. 13, page 123. [20]

**[Minutes of Trial, April 16, 1915.]**

Fortieth Court Day.

**[Caption and Title.]**

General March, 1915, Term. Friday, April 16, 1915.

**TRIAL BY JURY CONTINUED.**

Now at this time, at 2:00 P. M., the trial of said cause was resumed, the jurors heretofore drawn and accepted, the members of the regular panel of petit jurors, the defendant and attorneys being presented as heretofore,

The clerk thereupon proceeded to draw from the trial jury-box, one at a time, the ballots containing the names of the regular panel of petit jurors, and the respective attorneys examined said jurors and exercised their challenges against said jurors so drawn; the jurors so examined and accepted at this time being as follows, to wit:

E. W. Blakely, Daniel McCabe, A. H. Keller, and A. C. Wolf.

The Court admonished the jurors drawn, and further proceedings were continued until to-morrow at 10:00 A. M.

**CHARLES E. BUNNELL,**

District Judge.

Entered in Court Journal No. 13, page 124. [21]



**[Minutes of Trial, April 17, 1915.]**

[Caption and Title.]

General March, 1915, Term. Saturday, April 17,  
1915. Forty-first Court Day.

**TRIAL BY JURY CONTINUED.**

Now, on this day, this cause came on for continuance of trial, the jurors heretofore drawn and accepted, the remaining members of the regular panel of petit jurors, the defendant and respective attorneys, being present as heretofore, and the following proceedings were had, to wit:

The clerk proceeded to draw from the trial jury-box the ballots containing the names of the remaining members of the regular panel of petit jurors, until the ballots were exhausted and the jury incomplete; whereupon the Court directed the clerk to issue a writ of special venire directed to the United States Marshal, commanding him to summon from the body of the district ten (10) men qualified to sit and serve as jurors in this court and cause, said venire returnable at 1:30 P. M. this day.

Court admonished the jurors drawn and further proceedings were continued until 1:30 P. M.

Court declared recess until 1:30 P. M.

Thereafter, at 1:30 P. M., the trial of said cause was resumed, all parties appearing as heretofore.

The Marshal returned into Court the special venire and the members thereof each answering to his name as present, the clerk proceeded to draw from the trial

jury-box one at a time, the ballots containing the names of said special venire, and the respective attorneys exercised their challenges and examined said members so drawn, until the panel was complete, consisting of the following persons, to wit: [22]

H. Buzby,	Daniel Jacobson,
John Perlenda,	E. W. Blakely,
Ed Hering,	Daniel McCabe,
A. W. Van Sant,	A. H. Keller,
James Kirk,	A. C. Wolfe,
P. J. Wenn,	R. T. Blakely,

which said jury was duly sworn to try the issues in this cause.

Opening statement was had by R. F. Roth, United States Attorney, followed by statement of T. A. Marquam in behalf of defendant.

Whereupon the Court ordered that all witnesses, when not testifying, be, and they were excluded from the courtroom.

Selma Lappi was duly sworn and testified in behalf of plaintiff.

The Court admonished the jury, which jury remained in charge of their sworn bailiffs, and further proceedings were continued until Monday, April 19, 1915, at 10:00 A. M.

CHARLES E. BUNNELL,  
District Judge.

Entered in Court Journal No. 13, page 124. [23]

[Caption and Title.]

**Order for Special Venire for Trial Jurors.**

And now, to wit, April 17, 1915, this action being called for trial and the clerk having drawn from the trial jury-box of the court the ballots containing the names of the regularly drawn and impaneled trial jurors until the ballots are exhausted and the jury is incomplete; therefore,

IT IS NOW HEREBY ORDERED: That the clerk of this court issue a writ of special venire, directed to the U. S. Marshal for this Division and Territory commanding him to summons from the body of the District ten (10) men qualified to sit as trial jurors in this court and case, to be and appear in the courtroom at 1:30 P. M. this day.

CHARLES E. BUNNELL,  
District Judge.

[Indorsed]: Filed April 17, 1915. [24]

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**[Minutes of Trial, April 19, 1915.]**

[Caption and Title.]

General March, 1915, Term. Forty-second Court  
Day. Monday, April 19, 1915.

**TRIAL BY JURY CONTINUED.**

Now, on this day, this cause came on regularly for continuance of trial, the jury, the defendant, and respective attorneys appearing as heretofore.

Selma Lappi resumed the stand and testified in behalf of the plaintiff.



Mrs. John Lappi was duly sworn and testified in behalf of plaintiff.

The Court admonished the jury, which jury remained in charge of their sworn bailiffs, and further proceedings were continued until 2:00 P. M. this day.

Court declared recess at 2:00 P. M.

Thereafter, at 2:00 P. M., the trial of said cause was resumed, all parties appearing as heretofore.

Mrs. Selma Lappi resumed the stand and testified further in behalf of plaintiff.

Whereupon, upon motion of T. A. Marquam, attorney for defendant, and R. F. Roth, United States Attorney, not objecting thereto the Court, after admonishing the jury, continued further proceedings until to-morrow, at 10:00 A. M.

CHARLES E. BUNNELL,

District Judge.

Entered in Court Journal No. 13, page 126. [25]

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**[Minutes of Trial, April 20, 1915.]**

[Caption and Title.]

General March, 1915, Term. Tuesday, April 20, 1915. Forty-third Court Day.

**TRIAL BY JURY CONTINUED.**

Now, on this day, this cause came on regularly for continuance of trial, the jury, the defendant, and respective attorneys appearing as heretofore.

The Court ordered that the jury retire in charge of their sworn bailiffs while a legal matter in this cause is argued by the respective attorneys; where-

upon said legal matter was argued by respective attorneys.

Court declared a recess until 2:00 P. M.

Thereafter, at 2:00 P. M., said arguments were resumed, the jury still being absent from the Courtroom.

And now, at 4:40 P. M., the jury returned into the courtroom, the defendant and respective attorneys being present as heretofore.

Charlotte Geis was duly sworn and testified in behalf of the plaintiff.

The Court admonished the jury, which jury remained in charge of their sworn bailiffs, and further proceedings were continued until to-morrow at 10:00 o'clock A. M.

CHARLES E. BUNNELL,

District Judge.

Entered in Court Journal No. 13, page 127. [26]

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**[Minutes of Trial, April 21, 1915.]**

[Caption and Title.]

General March, 1915, Term. Wednesday, April 21, 1915. Forty-fourth Court Day.

**TRIAL BY JURY CONTINUED.**

Now, on this day, this cause came on regularly for continuance of trial, the jury, the defendant, and respective attorneys being present as heretofore.

R. F. Roth, United States Attorney, announced that the plaintiff rests.

Mrs. M. F. Hall was duly sworn and testified in behalf of defendant.

Dr. M. F. Hall was duly sworn and testified in his own behalf.

Court admonished the jury and further proceedings were continued until 1:30 P. M.

CHARLES E. BUNNELL,  
District Judge.

Entered in Court Journal No. 13, page 128. [27]

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[Caption and Title.]

General March, 1915, Term. Wednesday, April 21,  
1915. Forty-fourth Court Day.  
1:30 P. M.

#### TRIAL BY JURY CONTINUED.

Now, at this time, the trial of said cause was resumed, all parties appearing as heretofore.

Dr. M. F. Hall resumed the stand and testified further in his own behalf.

Thomas Dundon was duly sworn and testified in behalf of defendant.

Defendant rests.

John Lappi was duly sworn and testified in behalf of plaintiff in rebuttal.

Mrs. A. J. Nordale was duly sworn and testified in behalf of plaintiff in rebuttal.

Mrs. John Lappi and Selma Lappi, in the order named, were recalled and testified in behalf of plaintiff in rebuttal.

The Court admonished the jury, and further pro-



ceedings were continued until 10:00 A. M. to-morrow.

CHARLES E. BUNNELL,

District Judge.

Entered in Court Journal No. 13, page 128. [28]

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[Minutes of Trial, April 22, 1915.]

[Caption and Libel.]

General March, 1915, Term. Thursday, April 22, 1915. Forty-fifth Court Day.

TRIAL BY JURY CONTINUED.

Now, on this day, this cause came on regularly for continuance of trial, the jury, the respective attorneys and parties being present as heretofore, and the following proceedings were had, to wit:

John Lappi was recalled and testified further in behalf of plaintiff in rebuttal.

Dr. J. A. Sutherland and Mrs. P. J. Rickert, in the order named, were each duly sworn and testified in behalf of plaintiff in rebuttal.

Plaintiff rests.

Dr. M. F. Hall was recalled and testified in his own behalf in surrebuttal.

Defendant rests.

After opening argument by R. F. Roth, United States Attorney, in behalf of plaintiff, the jury was duly admonished by the Court, which jury remained in charge of their sworn bailiffs, and further proceedings were continued until 2:00 P. M. this day.

CHARLES E. BUNNELL,

District Judge.

Entered in Court Journal No. 13, page 129. [29]

**[Minutes of Trial, April 22, 1915.]**

[Caption and Title.]

General March, 1915, Term. Thursday, April 22,  
1915. Forty-fifth Court Day.

**TRIAL BY JURY CONTINUED.**

2:00 P. M.

Now, at this time, at 2:00 P. M., the trial of said cause was resumed, the jury the defendant and respective attorneys appearing as heretofore.

Argument was had by Mr. M. E. Stevens in behalf of defendant, followed by argument by T. A. Marquam in behalf of defendant, and closing argument by R. F. Roth, United States Attorney, in behalf of plaintiff.

The Court thereupon instructed the jury as to the law in the premises, and John Solen and S. T. Kincaid were duly sworn as bailiffs in charge of said jury, during their deliberation, whereupon said jury retired in charge of their sworn bailiffs to deliberate upon their verdict, at 6:00 P. M.

CHARLES E. BUNNELL,

District Judge.

Entered in Court Journal No. 13, page 130. [30]

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**[Minutes of Trial, April 22, 1915.]**

[Caption and Title.]

General March, 1915, Term. Thursday, April 22,  
1915. Forty-fifth Court Day.

**TRIAL BY JURY CONTINUED.**

8:35 P. M.

And now, at 8:35 P. M., came into court the jury

heretofore sworn to try the issues in said cause, and being called, all answered to their names as present, came also the United States Attorney, R. F. Roth, came likewise the defendant in person and with his attorneys, M. E. Stevens and T. A. Marquam, and said jury presented by and through their foreman, in open court, their verdict in said cause, which is in the words and figures as follows, to wit:

*“In the District Court for the Territory of Alaska,  
Fourth Judicial Division.*

No. 689—CR.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

M. F. HALL,

Defendant.

VERDICT.

We, the jury, duly empaneled and sworn to try the above-entitled action, do find the defendant M. F. Hall guilty as charged in the indictment.

Dated April 22, 1915.

DAN. McCABE,

Foreman.”

—which said verdict was received by the Court and ordered filed with the clerk of the court, and the jury was discharged from further deliberation in this cause. The defendant was released on the bond already given in this cause, the time for sentence and judgment to be fixed later.

CHARLES E. BUNNELL,

District Judge.

Entered in Court Journal No. 13, page 130. [31]



[Caption and Title.]

**Verdict.**

We, the jury, duly empaneled and sworn to try the above-entitled action, do find the defendant M. F. Hall guilty as charged in the indictment.

Dated April 22, 1915.

DAN McCABE,  
Foreman.

[Indorsed]: Filed April 22, 1915.

Entered in Court Journal No. 13, page 130. [32]

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[Caption and Title.]

**Affidavit in Support of Motion for a New Trial.**

United States of America,  
Territory of Alaska,—ss.

Morton E. Stevens, being duly sworn, on oath says: That he is one of the attorneys for the defendant in the above-entitled action; that he was present in the courtroom during the trial of said cause, and upon the last day of said trial was present during the whole time while the United States Attorney was making his opening and closing arguments to the jury; that during said opening argument Mr. R. F. Roth, United States Attorney, used the following language to and in addressing the jury:

“I believe that if there was ever a case proven beyond a reasonable doubt, and to an absolute mathematical certainty, this is the one.”

And that in the closing argument, the said United States Attorney, he used to, and in his address to the jury, the following language:

“Do you want to feed the babies of this community into the jaws of Doctor Hall?”

That these remarks of said United States Attorney were written down by affiant at the time they were made and contained the exact language used.

[Seal]

MORTON E. STEVENS.

Subscribed and sworn to before me this 24th day of April, 1915.

T. A. MARQUAM,

Notary Public for Alaska.

My commission expires July 20th, 1918. [33]

Service of the foregoing affidavit admitted and a true copy thereof received this 24 day of April, 1915.

H. E. PRATT,

Attorney for Plaintiff.

[Indorsed]: Filed April 24, 1915. [34]

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[Caption and Title.]

General March, 1915, Term. Monday, May 10, 1915.  
Sixtieth Court Day.

**Order Setting Hearing on Motion for New Trial.**

Now, on this day, came on the matter of setting the motion of defendant for a new trial and in arrest of judgment for hearing, the plaintiff being represented by G. Ellis Gardner, Assistant United States Attorney, the defendant appearing in person and by his attorney, T. A. Marquam; thereupon the Court set the motion for a new trial and in arrest of judg-

ment herein for hearing on Thursday, May 13, 1915,  
at 7:30 P. M.

CHARLES E. BUNNELL,

District Judge.

Entered in Court Journal No. 13, page 149. [35]

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[Caption and Title.]

General March, 1915, Term. Thursday, May 13,  
1915.

Sixty-third Court Day.

**Order Denying Motion for New Trial and in Arrest  
of Judgment.**

Now, on this day, came on for hearing defendant's motion for a new trial herein, and motion in arrest of judgment, the plaintiff being represented by R. F. Roth, United States Attorney, the defendant being represented by M. E. Stevens, and not being present in person; said motions were presented by M. E. Stevens, defendant's attorney and submitted to the Court without argument by R. F. Roth, United States Attorney; whereupon the Court being fully and duly advised in the premises.

IT IS ORDERED, that said motion for a new trial herein, and motion in arrest of judgment herein, be, and the same are hereby denied.

Clerk's Note: To which ruling of the Court M. E. Stevens, Attorney for defendant, excepted and exception was allowed.

CHARLES E. BUNNELL,

District Judge.

Entered in Court Journal No. 13, page 159. [36]



[Caption and Title.]

General March, 1915, Term. Thursday, May 13,  
1915.

Sixty-third Court Day.

**Order Fixing Time for Pronouncing Sentence.**

Now, on this day, the United States Attorney, R. F. Roth, appearing in behalf of plaintiff, the defendant being represented by M. E. Stevens, and not being present in person,

IT IS ORDERED, that the time for pronouncing sentence and judgment upon the defendant therein, be, and the same is set for Tuesday, May 18, 1915, at 10:00 A. M.

CHARLES E. BUNNELL,  
, District Judge.

Entered in Court Journal No. 13, page 159. [37]

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[Caption and Title.]

**Judgment and Sentence.**

Now, at this time, to wit, May 18th, 1915, the same being one of the regular March, 1915, term days of this Court, this cause came on in open session for the pronouncement of judgment and sentence of the Court upon M. E. Hall, the above-named defendant. United States appeared by its Attorney, R. F. Roth, and the defendant appeared in person and by his attorneys, Thomas A. Marquam, Morton E. Stevens and Leroy Tozier.

It appears to the Court and the Court so finds that a regular and lawful jury for the Fourth Ju-

dicial Division, Territory of Alaska, did, upon the 19th day of May, 1915, find and present a regular indictment against the defendant, M. F. Hall, charging him therein with the crime of an unlawful assault, not being armed with a dangerous weapon, upon the person of one Selma Lappi, upon the 24th day of September, 1914, at the town of Fairbanks, Fairbanks Precinct, Alaska; that upon the 22d day of March, 1915, the defendant was duly arraigned upon said indictment and that upon the 24th day of March, 1915, he entered his plea of not guilty thereto; that upon the 16th day of April, 1915, the same having been theretofore appointed as the time for the trial of said cause, the defendant, M. F. Hall, appeared in person and by his attorneys Thomas A. Marquam and Morton E. Stevens, and the United States appeared by its attorney, R. F. Roth, and the trial of said case was commenced; that upon the 16th, 17th, 19th, 20th, [38] 21st and 22d days of April, 1915, a jury of twelve men was duly and regularly empaneled and sworn to try the above-entitled case, evidence was introduced on behalf of the Government, and the defendant, M. F. Hall, and after argument of counsel, and being instructed by the Court as to the law of the case, said jury retired upon the 22d day of April, 1915, to consider its verdict, and the same day in open Court, and in the presence of the defendant, M. F. Hall, and his attorneys Thomas A. Marquam and Morton E. Stevens, said jury returned its verdict, which was in words and figures, as follows:

*“In the District Court for the Territory of Alaska,  
Fourth Judicial Division.*

No. 689—CR.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

H. F. HALL,

Defendant.

VERDICT.

We, the jury, duly empaneled and sworn to try the above-entitled action, do find the defendant, M. F. Hall, guilty as charged in the indictment.

Dated April 22, 1915.

DAN McCABE,  
Foreman.”

That thereafter, the defendant, M. F. Hall, filed a motion for a new trial and a motion in arrest of judgment, which said motions were upon the 13th day of May, 1915, denied.

Now, upon this 18th day of May, 1915, the same having been heretofore set as the time for pronouncing the judgment and sentence of the Court upon the defendant, the defendant was asked if he had anything to say why judgment and sentence should not be pronounced upon him, and he having made his statement in reply thereto, and the Court being fully advised upon the subject and in the premises.

IT IS THE JUDGMENT OF THE COURT that the defendant, M. F. Hall, is guilty of the crime of assault, without being armed with a dangerous weapon, as charged in said indictment and in accordance with said verdict, and it is the judgment and



sentence of the [39] Court that the defendant, M. F. Hall, be confined in the Federal jail, at Fairbanks, Fairbanks Precinct, Alaska, for a period of six months, and in addition to said imprisonment, be fined and he is hereby fined the sum of Five Hundred (\$500), which sum he shall pay to the United States of America, and in default of the payment whereof, he shall be confined in the said Federal jail one day for each Two dollars (\$2 ) of said fine remaining unpaid.

Dated at Fairbanks, Alaska, this 18th day of May, 1915.

CHARLES E. BUNNELL.

Entered in Court Journal No. 13, page 169.

[Endorsed]: No. 689—Cr. District Court, Territory of Alaska, Fourth Judicial Division. United States of America, Plaintiff, vs. M. F. Hall, Defendant. Judgment and Sentence. Filed in the District Court, Territory of Alaska, 4th Div. May 18, 1915. J. E. Clark, Clerk. By P. R. Wagner, Deputy. [40]

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[Caption and Title.]

General March, 1915, Term. Tuesday, May 18, 1915.

Sixty-seventh Court Day.

**Order Granting Stay of Execution.**

Now, on this day, on motion of T. A. Marquam, attorney for defendant.

IT IS ORDERED, that a stay of execution herein, be, and the same is hereby granted for a period of ten days, within which to file a supersedeas bond,

which bond is hereby fixed in the sum of fifteen hundred dollars (\$1500).

IT IS FURTHER ORDERED that debendant be, and he is hereby allowed until October 1, 1915, within which to prepare and file a bill of exception herein.

CHARLES E. BUNNELL,

District Judge.

Entered in Court Journal No. 13, page 170. [41]

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[Caption and Title.]

**Affidavit of Leroy Tozier.**

United States of America,  
Territory of Alaska,—ss.

Leroy Tozier, being duly sworn, upon oath deposes and says:

1. That T. A. Marquam, M. E. Stevens and this affiant were the attorneys retained by the defendant in this case to represent him in the defense of this prosecution, but by reason of serious illness, this affiant was prevented from being present during the trial of this cause and T. A. Marquam, M. E. Stevens, were the counsel representing the defendant herein during said trial.

2. That said trial resulted in a conviction against the defendant herein, who was condemned by judgment of this Honorable Court pronounced on May 18th, 1915, to six months imprisonment in jail and to pay a fine in the sum of \$500, and feeling himself aggrieved, decided to appeal from this cause to the 9th Circuit Court of Appeals for review thereof, and has retained this affiant to proceed with said appeal

and affiant is now engaged in the preparation thereof.

3. That affiant has been informed by said T. A. Marquam on or about May 25th inst, and the said M. E. Stevens, on May 26th inst., that they had withdrawn from this case, as counsel for the defendant, and upon further inquiry, this affiant is informed that the official court reporter who reported the evidence in this case, has been attending [42] to his duties in court, and will be unable for a few days more by reason of these same court duties which he is required to fulfill, to spare the necessary time to have the transcript of this said evidence made and given to the defendant or to the affiant, his counsel.

4. That affiant has been informed by the associated counsel and the defendant herein of the substance of the evidence introduced in the trial of this case and affiant, from such information as he has received, verily believes that the Court has erred in admitting some of the said evidence heard on trial and that thereby, the defendant has been greatly prejudiced.

5. That affiant is informed by E. T. Wolcott, official court reporter, and also by the defendant herein that the said transcript has been ordered to be made out, and that said E. T. Wolcott is now engaged in transcribing the same for use in said appeal, but that same cannot be delivered to the affiant for at least one week from the date hereof.

LEROY TOZIER.



Subscribed and sworn to before me this 27th day of May, 1915.

[Seal]

R. M. CRAWFORD,

Notary Public in and for the Territory of Alaska.

My commission expires May 10th, 1917.

Service of a true copy of above affidavit is hereby admitted this 27th day of May, 1915.

R. F. ROTH,

U. S. District Attorney.

[Indorsed]: Filed May 27, 1915. [43]

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[Caption and Title.]

**Order Extending Time [to October 1, 1915] for  
Preparing and Presenting Bill of Exceptions.**

WHEREAS, on the 22d day of April, 1915, on application of the defendant, time from said date until the first day of October, 1915, was given him to present and prepare for allowance herein his bill of exceptions, and whereas such order has never formally been entered of record.

NOW, THEREFORE, the clerk is hereby directed to enter such order now, for then, as follows;

On Application of the defendant he is given from the 22d day of April, 1915, to the first day of October, 1915, to prepare and present for allowance, his bill of exceptions herein.

CHARLES E. BUNNELL,

District Judge.

Done in open court this 30th day of Sept., 1915.

Entered in Court Journal No. 13, page 265.

[Indorsed]: Filed September 30, 1915. [44]

[Caption and Title.]

General March, 1915, Term. September 30, 1915.

One Hundred First Court Day.

**Order Fixing Time [to October 4, 1915] to File  
Objections [to Bill of Exceptions].**

Now, at this, time R. F. Roth, appearing for and on behalf of the Government and Leroy Tozier, appearing for and on behalf of defendant, and counsel for defendant having prepared and now presenting in open court his bill of exceptions in the above-entitled cause, and counsel for the Government having stated to the Court that he may wish to file objections thereto.

IT IS ORDERED that Monday, October 4th, 1915, to be fixed as the final day for filing objections to defendants bill of exceptions.

CHARLES E. BUNNELL,

District Judge.

Entered in Court Journal No. 13, page 265. [45]

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[Caption and Title.]

General March, 1915, Term. October 4, 1915. One

Hundred Third Court Day.

**Order Continuing Settling of Bill of Exceptions  
[Until October 5, 1915].**

Now, on this day, R. F. Roth, appearing for and on behalf of the Government, and Leroy Tozier, appearing for and on behalf of the defendant, and counsel for defendant having heretofore presented his bill of exceptions in the above-entitled cause, and

this day, Monday, October 4, 1915, being the time fixed for filing objections to said exceptions, upon the request and consent of counsel for the respective parties,

IT IS ORDERED, that the matter of settling defendant's bill of exceptions be and the same is hereby continued until 10:00 o'clock A. M., Tuesday, October 5th, 1915.

CHARLES E. BUNNELL,

District Judge.

Entered in Court Journal No. 13, page 268. [46]

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[Caption and Title.]

**Bill of Exceptions.**

BE IT REMEMBERED, That this case came on regularly for trial in above-entitled court at 10 A. M., April 16, 1915, before Honorable Charles E. Bunnell, judge of said court, presiding, when the defendant and his attorneys Thomas A. Marquam and Morton E. Stevens, and the United States Attorney R. F. Roth, were in court. Proceedings were taken to empanel a jury and were concluded April 17, 1915, when 12 men were duly sworn as the jury to try the case. During the course of the proceedings to empanel the jury, a recess was taken from 12 M., to 2 P. M., and the trial continued at 5:30 P. M., April 16, 1915, until the following day, and a recess taken from 12 M. to 2 P. M., April 17, 1915, and at the time of taking said last mentioned recess, an order was made that during the trial the jurors in box be kept together in custody of bailiffs, and



two bailiffs were then sworn and the jurors placed in their custody, and during the trial, the jurors in the box, and the jury when completed, were in the custody of said bailiffs during all recesses and continuances. That at the beginning of the trial the Court of its own motion, and with the consent of the prosecution and defendant, excluded from the court room all spectators as such, which order did **not** apply to or exclude persons having business before the Court, or officers, litigants, or others having business properly before the Court, attorneys, or representatives of newspapers, or witnesses in the case. [47\*—1†]

Immediately after the jury was sworn to try the case, Mr. Roth made an opening statement in behalf of the plaintiff, and Mr. Marquam made a statement in behalf of defendant. Thereupon the attorneys for defendant asked that the witnesses be excluded, and the Court ordered that all witnesses be excluded from the courtroom, save and except the witness on the witness-stand and the mother of Selma Lappi, and stated that in furtherance of justice and owing to the age of said Selma Lappi, namely, 9 years, her mother Mrs. Lappi might remain in the courtroom while said Selma Lappi gave her evidence, and the defendant excepted to Mrs. Lappi being so allowed to remain, and the Court allowed an exception. The defendant was present in court at all times when any testimony was given or proceedings had in said case from the beginning of the trial until the including

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\*Page-number appearing at foot of page of original certified Record.

†Original page-number appearing at foot of page of Bill of Exceptions of original certified Transcript of Record.

the rendering of the verdict. That as soon as the witnesses withdrew from the courtroom pursuant to said order, the following proceedings were had and testimony was taken:

**[Testimony of Selma Lappi, for Plaintiff.]**

SELMA LAPPI, witness for plaintiff, after being duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. ROTH.)

Q. What is your name?      A. Selma Lappi.

Q. Where do you live, Selma?

A. I live on Cushman Street and 11th.

Q. In Fairbanks?      A. Yes.

Q. Do you go to school?      A. Yes.

Q. What grade are you in?

A. In the second grade.

Q. Who is your teacher?      A. Miss Karrer.

Q. How long have you gone to school? Have you gone to school [48—2] two years?      A. Yes.

Q. Do you go to Sunday School?      A. Yes.

Q. What Sunday School do you go to?

A. Presbyterian.

Q. Who is your Sunday School teacher?

A. My Sunday School teacher is Mrs. Moore.

Q. How old are you?      A. Nine years old.

Q. When was your birthday?

A. July 25th, 1914.

Q. Did you ever live on Fairbanks Creek?

A. Yes.

Q. Do you remember where you lived on Fairbanks Creek?      A. Yes, sir.

(Testimony of Selma Lappi.)

Q. Is there anything the matter with your neck, Selma?

A. Yes, sir. I have got a lump there.

Q. Did you have any other lumps there?

A. Yes. I had one right here (showing), but it was operated on.

Q. Who operated on it? A. Doctor Hall.

Q. Do you know where you were when Doctor Hall operated on you? A. Yes.

Q. Where were you? A. At the hospital.

Q. What hospital were you operated at, Selma?

A. Across the river.

Q. St. Josephs? A. Yes. [49—3]

Q. Did Doctor Hall take care of your neck after he operated? A. Yes.

Q. Where would he take care of it? Where? Would you go any place where he took care of your neck afterwards? A. Yes. I went to his office.

Q. Where was his office? Do you remember what office it was—what building it was in?

A. I forget. I don't know the name of it, but I know.

Q. Was it upstairs over anything? Was it upstairs over any store? A. Yes.

Q. What store? A. Red Cross.

Q. The Red Cross Drugstore. Do you remember the last time that you went to Doctor Hall's office, Selma? A. Yes.

Q. Was that in the summer time, do you remember?



(Testimony of Selma Lappi.)

A. I don't know. I think it was in the fall sometime.

Q. Do you remember whether it was? Do you remember if it was last fall sometime?

A. I think it was last fall sometime.

Mr. ROTH.—Talk out loud, so that these gentlemen (indicating jury) and the stenographer can hear.

Q. The last day that you went up to Doctor Hall's office—Do you remember the last day? A. Yes.

The last day you were there did Doctor Hall do anything with your neck?

A. Yes. He picked out—I don't know what you call it, what kind of stuff. It was right there (indicating). He picked [50—4] some kind of stuff out of my neck.

Q. Was anybody in the office at that time?

A. There was someone out doors fixing the pipes.

Q. Do you know who those men were?

A. I think it was Mr. Dundon, and—I don't know the other man's name.

Q. Mr. Dundon was one of them?

A. Yes. And there was another man that works at the N. C.

Q. When he treated your neck was there anybody in the room where you and Doctor Hall were?

A. No.

Q. Do you know what time of day it was, Selma?

A. I think it was Friday.

Q. Do you know what time of day it was? Do you know what time it was by the clock, about?

(Testimony of Selma Lappi.)

Had you been to school?

A. Yes. I got out, I think it was, about 2 or half-past 2.

Q. When you got out of school, where did you go?

A. I came home first and I went down to Doctor Hall's office.

Q. Did you go right down to Doctor Hall's office as soon as you got home? A. Yes, sir.

Q. After Doctor Hall picked those things out of your neck, what did Doctor Hall do.

A. He unbuttoned my panties and wanted to know how fat I was.

Q. Where were you sitting when he did that, or were you sitting down at all?

A. There was a kind of a bed and I was sitting on the bed there. First he fixed my neck; then he took me and he told me to sit down; then he wanted to see how fat I was, and told me to come on his lap.

Q. Did you get on his lap? [51—5] A. Yes.

Q. Then what did he do?

A. He unbuttoned my panties, and he said he wanted to see how fat I was.

Q. When he unbuttoned your panties and said he wanted to see how fat you were, did you still stay on his lap?

A. No, he put me on the lounge and started to lay down, and he sat down and was feeling—(remainder inaudible).

Q. I didn't hear you?

A. He put me on the lounge. Then he was feeling me to see how fat I was.

(Testimony of Selma Lappi.)

Q. Where did he feel you?

A. Right here (indicating).

Q. What did he do with his finger?

A. He did like that (indicating), inside like that.

Q. Inside?      A. Yes.

Q. Did he say anything?

A. Then he said, "Does it hurt?" I said: "Yes," and then I said "No."

Q. You said "Yes" first, and then you said "No"?

A. Yes.

Q. How many times did he do like that (indicating) with his finger inside?      A. I don't know.

Q. Do you know how long he did that? (Witness cries.) Do you know at all how long it was?

A. No. I don't.

Q. Well, after he did that, then what did you do after he did that?

A. He told me to button up my panties. [52—6]

Q. All right. Did you button up your panties then?      A. Yes.

Q. Now, when he laid you down on the lounge, as you say, did he sit down on the lounge?

A. He lay down on the lounge, and I was lying down too.

Q. He lay down on the lounge and you were lying down too?      A. Yes.

Q. Was he behind you on the lounge?

A. He was behind me.

Q. When he told you to button up you panties, then what did you do?

A. Then he kissed me right here (indicating), and



(Testimony of Selma Lappi.)

he kissed me right here (indicating), and he said I am a nice girl.

Q. Where did he kiss you?

A. Right here, and right up here (indicating).

Q. Did he kiss you down there when your panties were open? A. I think so. Yes.

Q. He kissed you on the leg? A. Yes.

Q. And he kissed you up here too, on the cheek?

A. Yes.

Q. After you had your panties buttoned up, then what did you do?

A. Then I buttoned my panties, and then put on my coat.

Q. And then what did you do?

A. Then I went home.

Q. When you went home did you tell anybody about this?

Mr. MARQUAM.—We object—(interrupted).

A. I told mamma about it.

Mr. MARQUAM.—As irrelevant, incompetent and immaterial.

(Objection overruled.) (Defendant excepts. Exception allowed.) [53—7]

Q. Did you ever go back any more?

A. No. I was to go back Saturday, and mamma wouldn't let me. Well, I told mamma about it, and I said, "I don't want to go down there."

Mr. ROTH.—You may cross-examine.

(Here a ten minute recess was taken, and after recess the witness resumes her testimony.)

(Testimony of Selma Lappi.)

Cross-examination.

(By Mr. MARQUAM.)

Q. Do you know this gentleman here that was asking questions of you?     A. Yes.

Q. How long have you known him, do you remember, or do you remember when you first met him or first saw him? Do you know his name?

A. Yes. Mr. Roth?

Q. When did you first see Mr. Roth that you remember? Can you remember, Selma, when you first saw him?     A. No.

Q. You don't know how long it has been since you first saw him?     A. No.

Q. Haven't you any idea?     A. No.

Q. Do you remember where you first saw him; where you were and where he was when you first saw him?

A. I think it was over here that I saw him.

Q. You mean in this building?     A. Yes.

Q. Do you know about how long ago it was?

A. I think—It was just lately. [54—8]

Q. Has he ever been at your house, do you know?

A. Yes. He has been up to our house.

Q. How many times, do you know?

A. I think it was about twice, or once.

Q. Did he talk with you at that time?

A. It was one noon-time when he was over there when I was at school, I think it was.

Q. I mean when you were there.

A. There was only once when I was there.

(Testimony of Selma Lappi.)

Q. Did he talk with you about this matter at that time?     A. Yes.

Q. For how long a time, do you remember?

A. Just a little while; not very long.

Q. Who was there besides you and Mr. Roth. Was your mother there?     A. Yes.

Q. Was there anybody else?

A. There was another lady. She was in the other room making me a new dress.

Q. Did you come down to Mr. Roth's office in this building? Is that the place where you were?

A. Yes.

Q. And you talked with Mr. Roth there?

A. Well, I talked at home with him.

Q. Did you talk with him at the office?     A. Yes.

Q. Did he ask you questions?     A. Yes.

Q. About the same questions that he asked you a while ago?     A. Yes.

Q. Have you talked with anybody else about the matters that you [55—9] talked about here?

A. No.

Q. With no one?     A. No.

Q. You talked with your mother, didn't you?

A. Yes.

Q. Anybody else besides your mother?

A. No. There was not anybody else.

Q. How often have you talked to your mother about this matter? Can you tell the jury about how often?

The COURT.—I would suggest that you might get the same result by asking her if it was a great



(Testimony of Selma Lappi.)

many times or a few times, without using the words "how often."

(Mr. MARQUAM.)

Q. Did you talk many times to your mother about this, and did she talk to you many times—a good many times or not?   A. (No answer.)

Q. Do you remember, Selma, about how many times, or how often?   A. No.

Q. Do you know when this was—about when it was last fall or this fall that you went down to Doctor Hall's the last time?

A. It was the day when my papa left.

Q. Where was your papa going?   A. To Ruby.

Q. You don't know, of course, what month that was, do you?   A. No, I don't.

Q. Did he come back from Ruby?   A. Yes.

Q. Do you know where he is now?   The Tolovana, is that where he is?   A. Yes. [56—10]

Q. How many times, Selma, had you been to Doctor Hall's office before this last time, if you remember?   A. I don't remember.

Q. A good many times, or just a few times

A. Not so very many.

Q. What is that?   A. Just a little while.

Q. You understand what I ask you when I ask you how many times. How many different times were you up to Doctor Hall's office? You understand what I am asking you. What would you say to that; about how many times were you up there?

A. Just a few times.

Q. A dozen times? Do you know how many a

(Testimony of Selma Lappi.)

dozen is?      A. Yes, I know.

Q. Was it that many times?

A. Maybe it was a little longer. I don't know.

Q. Maybe it was a few more times?

A. Yes. But I don't remember how many it was.

Q. Do you remember the first time that you saw Doctor Hall?      A. Yes.

Q. Where was that?

A. He was out on the creek. And we came in, and I went to his office, and mama talked about my neck.

Q. Do you remember the time you were in the hospital and that Doctor Hall was attending to your neck?      A. Yes.

Q. How long before that particular time was it that you first saw Doctor Hall? (No answer.) Can you think, Selma, and tell me about how long before you went to the hospital you had seen Doctor Hall?      A. I think it was about twice. [57—11]

Q. No, that was not what I wanted; not how many times you had seen him before you went to the hospital, but how many weeks or months. You understand what a week is; it is seven days, and a month is thirty days. You know that?      A. Yes.

Q. Was it a week or a month or how long before you went to the hospital that you first saw Doctor Hall? Can you think and tell us?      A. No.

Q. What did you say about out on Fairbanks Creek?

A. I saw him the first time there.

Q. Do you remember seeing Doctor Hall out on Fairbanks Creek?      A. Yes.

(Testimony of Selma Lappi.)

Q. When you were pretty sick and your neck was pretty bad and it hurt you pretty bad?

A. Yes, there was a man out on the creek and he had some kind of a sore on him, and then mamma knew he was out on Fairbanks Creek, and she called him over to her house.

Q. And he came to see you there.      A. Yes.

Q. Was that the first time that you had ever seen Doctor Hall?      A. I don't remember.

Q. You don't remember of ever having seen him before that time. You can't think of any other time.

A. No.

Q. You came to the hospital, and Doctor Hall treated you. Do you know what he did on that occasion in the hospital?

A. Yes. He put me on a table and fixed my neck, and when he fixed my neck he did something to it.

Q. Do you remember about that?      A. Yes.  
[58—12]

Q. Do you remember what he did to your neck?

A. He made an operation on it.

Q. Do you remember it?      A. Yes.

Q. Do you remember at the time he was doing it? Did you remember it from that?      A. Yes.

Q. Wasn't you asleep when that was done?

A. No. The second time I went to sleep.

Q. There was twice, Selma, that you were in the hospital?      A. Yes.

Q. And that Doctor Hall operated?

A. Yes. I was over there longer, but it was only twice that he operated.



(Testimony of Selma Lappi.)

Q. The second time is when you say you were asleep.     A. Yes.

Q. You took chloroform?     A. Yes.

Q. Do you remember that?     A. Yes.

Q. And you remember what it felt like?

A. Yes.

Q. And you didn't know anything about what the doctor was doing until after it was all over, did you?

A. No.

Q. After you got awake again, after you got out of the chloroform, did you have any bandages around your neck?

A. Yes, I had bandages around my neck.

Q. Do you remember how long you were in the hospital, that is the last time, the time you went to sleep when the doctor was working with you? What I mean is; how many days. (No [59—13] answer.) You remember when you waked up after this operation, do you?     A. Yes.

Q. Do you remember how many days and nights you stayed over at the hospital there with the sisters?     A. I don't remember how many.

Q. After you got out of the hospital, do you remember where you went then and where you lived?

A. I went up to my house.

Q. Where did you go after you left the hospital?

A. I went home.

Q. In town here?     A. Yes.

Q. Then after that you went down to Doctor Hall's office.     A. Not the same day.

Q. But days after that.     A. Yes.

(Testimony of Selma Lappi.)

Q. How many days was it after you left the hospital before you went down to his office?

A. I don't remember.

Q. Do you think it was as long as a week?

A. It might have been. I don't remember.

Q. Who went with you to Doctor Hall's office when you went there the first time?

A. My mamma.

Q. Do you remember what Doctor Hall did on that occasion? What did he do when you went there the first time? A. He fixed my neck.

Q. Do you know how he fixed it? What I mean is; What did he do to your neck at that time?

A. He put a bandage around it and put some stuff on it, but I [60—14] don't know what you call it.

Q. Some stuff that would stick to your neck and hold the bandages on?

A. No, he didn't do that. He put something right here, some other stuff too, and then he put some bandages on.

Q. That was the first time you went there?

A. Yes.

Q. Afterwards, when you went there on any occasion, didn't he dress this cut in your neck?

A. Yes.

Q. Who was with you the second time you went there? A. It was my mamma.

Q. Did some other lady go with you when you went to Doctor Hall's office? A. Yes.

Q. Who was it who went to Doctor Hall's office with you except your mother?

(Testimony of Selma Lappi.)

A. Anita Nordale went about twice. I don't know how many times, but it was twice though.

Q. For awhile, while you were going to Doctor Hall's, you were living with the Nordale's, weren't you? A. Yes. I was staying over there.

Q. And your mamma and papa were out on Fairbanks Creek. A. Yes.

Q. And who else? What was her name, Anita Nordale? A. Yes. Anita Nordale.

Q. Who else went up with you to Doctor Hall's office? A. And my brother, he went with me.

Q. Who went with you the last time you went up there?

A. I went by myself. Arthur started to go with me, but he would not go. [61—15]

Q. Is that your brother Arthur?

A. Yes. But he said he wanted to go and play with the boys. Then mamma said, "All right." And he went and played with the boys, and I went down there.

Q. Was that the only time you went up there alone? A. Yes.

Q. Someone was with you every other time.

A. Yes.

Q. Who did you ever see up in Doctor Hall's office when you went there during these visits?

A. Mrs. Hall.

Q. Anybody else? A. I don't remember.

Q. How long would you be there on these different occasions when you would go up there to have your neck dressed—your neck treated; how long would



(Testimony of Selma Lappi.)

you be there each day?

A. I would be there about a half an hour sometimes, and sometimes longer. I don't know how long, but about a half an hour, something like that. It was not very long, anyway.

Q. When Doctor Hall was fixing your neck and dressing it, where would you be—where in his office would you be?

A. In the room where he dresses people.

Q. What? A. Where he dresses people.

Q. You mean where he dresses their wounds. Is that what you mean? A. Yes.

Q. Can you tell the jury—Do you remember how many rooms Doctor Hall had in his office there.

A. He had a sitting room; then he had the other room where he dresses people.

Q. Were there any others that you know of?  
[62—16]

A. I think there is another room where he weighs people to see how fat they are.

Q. Did he ever weigh you, Selma? A. Yes.

Q. In this room? A. No. In the other room.

Q. How did he weigh you?

A. I stand on that thing there; then there is a thing up there—

Q. That tells how heavy you are? A. Yes.

Q. How many times did he weigh you, Selma?  
Do you remember?

A. I think it was more than once.

Q. Do you remember how much you weighed?  
Can you think and tell us, or do you remember?

(Testimony of Selma Lappi.)

What did he say at the time he was weighing you?

A. To see how fat I was.

Q. When you would come again, would he weigh you again to see whether you were getting fatter or thinner? A. Yes.

Q. And would he write it down, do you know, how much you weighed? A. I don't remember.

Q. Now, as I understand you to say a while ago, when you were being asked questions by Mr. Roth, when you went there the last time there was somebody there. Who was it?

A. It was Mr. Dundon and one other man but I don't know his name.

Q. Do you know Mr. Dundon? A. Yes.

Q. How long have you known Mr. Dundon?

A. I just seen him on the street and I would say, "How do you do" to him.

Q. You would say, "How do you do" to him, and he would say, "How [63—17] do you do" to you. Did he speak to you that day?

A. No. Because he didn't know me then.

Q. Did you know him then? A. Yes.

Q. How did you know who he was, Selma? Did somebody tell you?

A. Yes. My mamma told me.

Q. Your mamma told you who it was.

A. Yes.

Q. That is, she pointed him out to you on the street sometime. A. Yes.

Q. Well, you can't tell and you can't think of who the other man was that was there. A. No.

(Testimony of Selma Lappi.)

Q. How long were you there that day?

A. It was not very long, just a little while. I don't know how long it was.

Q. You know about how long five minutes is, and ten minutes, and fifteen minutes. Give us some idea of about how long you were there.

A. It might have been a half an hour, something like that.

Q. What time does your school let out, or what time did it let out then?

A. I don't remember what time it lets out; sometimes at 2 and sometimes at half-past 2.

Q. You understand I am meaning at the time last fall when you went to Doctor Hall's the last time.

A. Yes.

Q. That is what I mean. What time did school let out?      A. I don't remember.

Q. Did it let out then the same time it does now in the afternoon? [64—18]

A. Sometimes school lets out at half-past 2 and sometimes a little after half-past 2, but it didn't use to.

Q. What time did it let out, about?

A. It used to let out at 2, and half-past 2, and sometimes it lets out at 3 now.

Q. From school, this day you told us about, you went right home, to your mother's home.

A. Yes.

Q. Your brother went to school with you.

A. Yes.

Q. How old is he?      A. He is seven years old.



(Testimony of Selma Lappi.)

Q. Did you start down town together from the house?     A. No.

Q. He didn't get home from school?

A. Yes. He got home from school, and he said he wanted to stay and play with the boys.

Q. And your mother told him to go with you.

A. Yes, She told him to.

Q. But he didn't want to go, and your mother knew he was not going with you before you left the house, did she?     A. Yes.

Q. How long did you stay at home before you started down town?     A. Just a little while.

Q. And you went right to Doctor Hall's office.

A. Yes.

Q. And then, after you left Doctor Hall's office, did you go right home?     A. Yes.

Q. And your mother was home when you got home.     A. Yes. [65—19]

Q. Who was in the office when you went there that day, that is, besides Doctor Hall? Was he there when you got there?     A. Yes.

Q. Anybody else there?     A. I don't remember.

Q. You don't remember of anybody. Well, you didn't see Mr. Dundon at that time when you first went there?

A. Yes. I saw him. He was out in the other room. He was fixing the pipes. When you go upstairs there is a place right there where he fixed the pipes.

Q. Outside of Doctor Hall's office?     A. Yes.

Q. Did you see him in Doctor Hall's office at any

(Testimony of Selma Lappi.)

time you were there?

A. Yes. Then he went out and fixed the pipes. Then Doctor Hall told me to sit down, and the men left.

Q. Then the men left? A. Yes.

Q. When Doctor Hall told you to sit down, which room were you in—in his office?

A. I wasn't in the sitting-room. I was in the other room.

Q. In the room where you say he dressed people?

A. Yes.

Q. Did you ever hear him call it the operating room? A. Yes.

Q. Is that the room you were in? A. Yes.

Q. When you went in there was the door that went from the reception-room—Is that what you call it? The first room you go in, you call the reception room, or did you ever hear it called that? A. Yes.

[66—20]

Q. There is a door between, isn't there?

A. Yes.

Q. When you went into the operating-room, was the door closed between the two?

A. I think it was open, and then he closed it.

Q. Did he lock it?

A. He didn't lock it, no. He just closed it.

Q. And you sat on the couch, you say, first?

A. Yes.

Q. While he dressed your neck?

A. No, It was on the operating-table,

Q. What?

(Testimony of Selma Lappi.)

A. It was on the operating-table.

Q. Were you lying down on the operating-table?

A. Just sitting down.

Q. And what did he do that time; what did he do with your neck?

A. He had a little thing, some kind of a thing—

Q. Speak louder.

A. He had a little thing like this, and he did like this (showing). There was some kind of stuff there and he pulled that out.

Q. What was it he had in his finger or in his hand, do you know? A. Some kind of a—

Q. Can you tell us what it was like, if you don't know what the name of it was? Was it medicine?

A. No, it wasn't medicine.

Q. Some kind of an instrument, was it?

A. Yes.

Q. What was he doing with it?

A. He had it like this, a little thing like this (showing). He opened it and closed it, and he did like this, and pulled this out. [67—21]

Q. It was a kind of a pinchers? A. Yes.

Q. That he was pulling the cotton out of this *would* with? A. Yes.

Q. Was there anything on your neck held over this wound? A. No.

Q. Was there some cotton on your neck?

A. No. There was just some kind of stuff that came there. The scar was just here, and some kind of stuff came.

Q. Did you have bandages around your neck?



(Testimony of Selma Lappi.)

A. Yes, I had a handkerchief.

Q. That was bound or tied around your neck over this wound?      A. Yes.

Q. When you went home did you have a bandage around it?

A. Yes. I had this handkerchief around it.

Q. You put it on or the doctor?

A. I think I did.

Q. In his office?      A. Yes.

Q. Tie it, or how did you fasten it on?

A. I just tied it on like this (indicating).

Q. Did the doctor say that your neck was well then?

A. No, he didn't say so then, but he said it was pretty near well, healed up.

Q. Didn't the doctor tell you at that time that you needn't come any more?

A. No. He told me to come on Friday; then he told me to come Saturday.

Q. That was on Friday, you are sure?

A. Yes. It was on Friday.

Q. And you were to come Saturday?

A. Yes. [68—22]

Q. But you didn't come?

A. No. I didn't go back.

Q. After he got through dressing your neck while you were sitting *in* the operating-table, then what did you do?

A. Then he *tole* me to sit down while the men were fixing the pipes of the house, and I didn't know what he wanted. Then he took me on his lap, and then he unbuttoned my panties. Then he put me on the

(Testimony of Selma Lappi.)

lounge and unbuttoned my panties. Then he gave me a piece of candy. And then he told me to button up my panties. That is all he told me.

Q. He gave you some candy, you say? A. Yes.

Q. What kind of candy was it?

A. Chocolate.

Q. Where did he get that?

A. I don't know.

Q. Was your treatment, as far as your neck was concerned, all through then? A. No.

Q. That is, when you sat down on the lounge was he through treating your neck—I mean for that day?

A. Yes.

Q. He was all through? A. Yes.

Q. Did you have your hat on? A. No.

Q. After you got off of the operating-table and sat down on the lounge, did you sit up on the operating-table any more that day? A. No. [69—23]

Q. You say he asked you to stay and wait there?

A. Yes.

Q. And these men were there? A. Yes.

Q. Both of them that you had seen? A. Yes.

Q. Were they in this same room? A. Yes.

Q. What were they doing there?

A. They were fixing the pipes, and then they left.

Q. What did he say to you at that time; do you remember?

A. He said he wanted to see how fat I was.

Q. Had he weighed you that day? A. Yes.

Q. Had he written down the amount that you had weighed, do you know, that is how much you weighed,

(Testimony of Selma Lappi.)

had he written that down?      A. I don't know.

Q. Had he before this?    Before this, I understood when he would weigh you he would find out how much you would weigh, to see whether you were getting any thinner or fatter, and then he would write it down.    Is that right?

A. He didn't do that when I was there, he didn't put it down.    But maybe when I left he put it down.

Q. You didn't see him write it down?      A. No.

Q. At any time?      A. No.

Q. He would tell you how much you weighed?

A. Yes.

Q. Would he tell you whether you were getting fatter or not?    [70—24]

A. He told me I was getting fatter.

Q. Right along while he was treating you that you were getting fatter?      A. Yes.

Q. On this occasion did he unbutton your clothes, that is, did he do it himself or did you?

A. I think he did it.

Q. Do you remember, Selma?

A. Yes, I think he did.    Yes, he did it.

Q. How many buttons were there?      A. Two.

Q. What do you call these clothes he unbuttoned. What do you call them?    What does your mother call them?      A. Drawers.

Q. Is that what he unbuttoned?      A. Yes.

Q. Just tell us again just what the doctor did after he unbuttoned these drawers.

Q. Well, he was sitting on a chair, and he put me on his lap.    Then pretty soon he got tired and he



(Testimony of Selma Lappi.)

went and lay on the lounge and told me to lay down too, and then he was feeling how fat I was.

Q. He was feeling you. Whereabouts did he feel you first?

A. All around here (indicating), and then right here (indicating).

Q. What do you mean "right here"?

A. Right here (indicating).

Q. Inside of you? A. Yes.

Q. Can you tell the jury, Selma, how far he *left* inside of your? About how far? (No answer.) Do you know what I mean? A. Yes. [71—25]

Q. Could you tell about how far with his fingers?

A. Yes.

Q. What finger or which hand was he using, do you know?

A. The right hand, I think. I am not sure.

Q. Do you know how far inside of you he felt with his finger? Was it quite a ways? Do you remember? A. No.

Q. Did it hurt you? A. A little.

Q. How did it hurt you?

A. It hurt me. It kind of pained me.

Q. You told Mr. Roth—you made some movement to describe what he was doing. What was that, Selma? (No answer.) Do you remember what you said to Mr. Roth when he was asking you a question? Do you remember of saying to Mr. Roth, Selma, when he was asking you about that; that you moved your hand something in this manner when you were describing it to him. To you remember? (No an-

(Testimony of Selma Lappi.)

swer.) Just a moment ago when Mr. Roth was asking you questions, do you remember that Mr. Roth moved his hand around something like this (indicating), and you did that too? Do you remember that? A. I don't remember that.

A. I don't remember that.

Q. Did Doctor Hall make any movement like that?

A. Yes. He did like this (indicating).

Q. Where was that?

A. Right here (indicating).

Q. Inside? A. Yes.

Q. Quite a little ways inside?

A. Just a little. [72—26]

Q. And it pained you and hurt you? A. Yes.

Q. And I believe you say he asked you if it hurt?

A. Yes. And I said "Yes," and then I said "No."

Q. How long was that? How long a time did that take, do you know? What I mean is, how many minutes or seconds?

A. Half an hour, or not quite that long?

Q. That he was making this movement, this motion? A. Yes.

Q. A half an hour?

A. I think it was a half an hour or not quite that long.

Q. What do you think, Selma?

A. It might have been half an hour.

Q. Do you know how long a half an hour is?

A. Yes.

Q. How long do you think you were at the office altogether?

(Testimony of Selma Lappi.)

A. I think about half an hour.

Q. Did you cry at any time while you were there?

A. No.

Q. While you were in Doctor's Hall's office did you ever cry by reason of anything he did to you?

A. This same day?

Q. Yes.

A. No. I didn't cry that day.

Q. Did you at other times?

A. Yes, sir. I didn't always, but a few times.

Q. You did cry a good many times there?

A. Not very many times.

Q. When you did do that, what were you crying about? Did he mistreat you?

A. Yes, he did something, the same kind of a thing he did to [73—27] me, and there was some kind of stuff and he pushed that in and took it out and it hurt like everything (pointing to her neck).

Q. How many times did that occur? How many different times? A. I don't remember.

Q. Do you want to take a little rest? Are you getting tired? A. No.

Q. And you were crying because the doctor was hurting you? A. Yes.

Q. Tell the jury what he was doing?

A. There was some kind of a thing he put in and pulled it out. (Pointing to her neck.) That was the day Anita went with me.

Q. Was it just once that you did that?

A. I think it was twice when Anita went with me.



(Testimony of Selma Lappi.)

Q. Was it any time when Anita didn't go with you that you cried?

A. Pretty near every time when Anita was there he did that. He did that pretty near every day then.

(Short recess, and after recess witness resumes testimony.)

Q. Was anybody else ever present when Doctor Hall treated your neck and you say that you cried, besides Anita Nordale?

A. I don't know. I think there were some people there in the other room.

Q. You mean—(interrupted).

A. In the sitting-room.

Q. Was that more than once, or just once?

A. I don't know. I don't remember.

Q. Do you remember of anybody besides Anita Nordale who was ever there in the room when you say you cried?

A. I think Mrs. Hall was there once. [74—28]

Q. In the same room with you?

A. Yes, she was in the same room to see how my neck looked.

Q. How many times did you see Mrs. Hall there; just the once?

A. Maybe three or four times.

Q. Would she be in the room where you were?

A. Sometimes she would be in the other room and sometimes she would be in the same room where we were.

Q. Do you know Mrs. Hall?      A. Yes.

Q. Where did you first see Mrs. Hall?

(Testimony of Selma Lappi.)

A. In Doctor Hall's office?

Q. Did you ever see her any place else?

A. I don't believe I have.

Q. Was there anybody else ever there when you cried? A. I don't know.

Q. Just why was it that you cried when you were there? A. Because it hurt.

Q. This place where it had been cut hurt, did it?

A. Yes. And there was some kind of stuff that he pulled out, that stuck; stuff that he put on down here (showing) and it stuck on the skin, and he pulled that off and it hurt.

Q. And it was just when he would touch this wound or pulled that sticky stuff off that it hurt. Was that the only reason you cried?

A. And then he pulled that off, and there was something in here (showin), and he pulled that out and it hurt.

Q. Did he give you any medicine at that time, do you know? A. No. I don't think so.

Q. It was just because it pained you. You know what I mean when I say "pained"?

A. Yes.

Q. It pained you, and that is the reason you cried.  
[75—29]

A. Yes.

Q. At any other time did the doctor feel you to see whether you were fat or getting thinner?

A. That was the only time.

Q. Where was the doctor when you say that you sat on his lap; where was he sitting?

(Testimony of Selma Lappi.)

A. There is a table where he keeps some books and all kinds of things, and there was a seat right close there and he was sitting right on that and he put me on his lap.

Q. Which side of the table was the seat?

A. Right close to the window.

Q. How close to the window was that seat?

A. The window was to the right, and the seat is right here. (Indicating.)

Q. Was that where you sat on his lap? A. Yes.

Q. How long were you on his lap?

A. Just a little while. It was not very long.

Q. Where were you when you say he unbuttoned your drawers? A. I was on his lap.

Q. What did you say to him, or he say to you? Tell us everything that was said then.

A. He said he wanted to see how fat I was, and then he sat down and he was sitting on a chair. Then he put me on his lap. Then he put me on the lounge.

Q. Just a minute. I didn't quite understand that. You say he put you on his lap? A. Yes. [76—30]

Q. What did he say to you then; just that he wanted to see how fat you were? A. Yes.

Q. Tell us everything he did then.

A. He felt all around me (showing), right down here, and right around here.

Q. While you were sitting on his lap? A. Yes.

Q. Did he feel your stomach? A. No.

Q. He didn't?

A. As far as to here. He felt me right here (showing).



(Testimony of Selma Lappi.)

Q. And around to the sides?      A. Yes.

Q. And on your legs?

A. No. From right here (showing).

Q. Do you know what your stomach is? Do you know what I mean when I ask about your stomach?

A. This. Yes.

Q. This part of you right around here (showing). That is your stomach. Do you know that?

A. Yes.

Q. Did he put his hands on your stomach and feel?

A. No. He started from right here, and he touched me right up to here, and all right around here (showing).

Q. He didn't feel your stomach at all?      A. No.

Q. That was all done while you were sitting on his lap?      A. Yes.

Q. How long was that?

A. Just a little while. It was not very long.

[77—31]

Q. Then what did he do?

A. He put me on the lounge.

Q. What do you mean by he put you? Did he ask you to get on the lounge, or did you go over there yourself?      A. Yes.

Q. And sit down on the lounge.      A. Yes.

Q. What did he do?

A. He lay down. He was sitting down.

Q. Sitting down where?

A. He was sitting down on the couch, and he feeled me all around, and then he lay down and then I lay down too, and he feeled me all around.

(Testimony of Selma Lappi.)

Q. Why did you lay down?

A. Because he told me to.

Q. And he lay down?      A. Yes.

Q. And he felt you again.      A. Yes.

Q. What did he say that time, if anything? Did he say anything to you?      A. No.

Q. Did you ask him why he was doing that?

A. No. I didn't say a thing.

Q. Then what else did he do?

A. Then he buttoned up my pants. Then he gave me a piece of candy. Before I buttoned up my pants he kissed me right here and he kissed me right there (showing).

Q. Tell us where he kissed you?

A. Right there (showing).

Q. What part of you is that?

A. Close to my knee. [78—32]

Q. Pretty close to the knee?      A. Yes.

Q. Then where else did he kiss you?

A. Right on the cheek here.

Q. Then you buttoned up your panties.

A. I did.

Q. You buttoned them up?      A. I think he did.

Q. You think he did.      A. Yes.

Q. How many buttons were there to button up?

A. Two.

Q. Did you see that with your own eyes, that they were unbuttoned?      A. Yes.

Q. Could you look down and see that?      A. Yes.

Q. What kind of a dress did you have on?

A. I think it was a brown dress. I am not sure.

(Testimony of Selma Lappi.)

Q. Was there anything else after he buttoned up—you say he buttoned up your drawers, buttoned those two buttons; then what did he do?

A. Then I put on my coat, and then I went home. And he told me to come the next day.

Q. Well, now, have you told us everything?

A. Yes.

Q. Since I have been asking you the last minute or two since you were on the stand, have you told us everything that occurred? A. Yes.

Q. You told those things before when you were testifying? [79—33] A. Yes.

Q. But you didn't tell us as much this time as you did before. Have you forgotten to tell us anything this time when I asked you to tell everything that was done? A. That is all.

Q. Now, just so we will be sure about it; after you got off the operating-table, everything had been done to your neck that had to be done, was it? A. Yes.

Q. How long did it take the doctor to attend to your neck? A. Just a little while.

Q. About how many minutes do you think?

A. I don't remember.

Q. Five or ten minutes?

A. Maybe. I think so.

Q. Did you cry that day?

A. No. It didn't hurt that day.

Q. Then you say the doctor went and sat on the chair. A. Yes.

Q. And you went upon his lap. A. Yes.

Q. Sat upon his lap, and then is where you say he



(**Testimony of Selma Lappi.**)

unbuttoned your drawers.      A. Yes.

Q. And felt you around your legs; and anything else then that he did at that time?

A. No, I think that is about all

Q. And then he asked you to go over and sit on the lounge.      A. Yes.

Q. And he went over and sat on the lounge.

A. Yes.

[80—34]

Q. And you said he lay down.      A. Yes.

Q. How did he lay down on the lounge?

A. Like this (showing) on a pillow. There were two pillows, and he was right on top of them like that.

Q. Then after you lay down, what was the next thing that he did or that you did?

A. Then he got up, and he told me to button my drawers. No, he didn't tell me that; first he kissed me right here, and he said I had been a nice girl and hadn't cried very much; then he kissed me right here and right up here (showing),

Q. What else?

A. Then he buttoned up my drawers, or I think I did it myself.

Q. Which way was it, Selma?

A. I think it was me that did it.

Q. And not the doctor.      A. Yes.

Q. Were you standing up or still sitting down?

A. I was standing up.

Q. Was there anything else that he did or that you did?      A. That is all.

**(Testimony of Selma Lappi.)**

Q. You can't think of anything else.

A. No, I can't think of anything else.

Q. Do you know, Selma, when you were over in the hospital how you happened to go to sleep when this operation was performed?     A. Yes.

Q. How?     A. I took some chloroform.

Q. Do you remember anything about that there?

A. Yes. [81—35]

Q. Did you only take chloroform once?

A. Only once.

Q. Did the doctor ever give you any chloroform again?

A. No, he didn't give me any chloroform, but one time I went over I think with Anita—with my brother once and there was some kind of stuff all around my neck here and he had to take it off with chloroform, and it hurt, and I kind of went to sleep—pretty near went to sleep, but I didn't.

Q. Did it make you sick?     A. Yes.

Q. Did you cry?     A. Oh, a little, I screamed.

Q. Who was there then?     A. My brother.

Q. Anybody else?

A. I think Mrs. Hall was there too.

Q. What did you do then, do you remember; that is, do you remember how it affected you, or how you acted?     A. I cried a little.

Q. Anything else that you remember that you did?

A. That is about all.

Q. That just happened once?

A. Yes. And another time he did it, but he didn't use so much chloroform, and when I started again

(Testimony of Selma Lappi.)

he told me to shut up.

Q. What?      A. He told me to shut up.

Q. He told you to shut up?      A. Yes.

Q. Who, the doctor?

A. Yes. And then I closed my mouth and closed my eyes, and it [82—36] didn't hurt at all.

Q. Did your father ever go to Doctor Hall's office with you while you were having your neck dressed?

A. Yes. Papa went a few times; not so very many times.

Q. What?      A. Only a few times.

Q. Did anything like that ever happen while your father was there?      A. No.

Q. At the time that you speak about when the doctor used a little chloroform, do you remember everything that happened?      A. Yes, sir.

Q. Have you told us everything that happened so far as you were concerned?      A. Yes.

Q. And you just cried?      A. Yes.

Q. Nothing else that you remember of? Do you remember of anything else?      A. That is all.

Q. You say that while you were in there that last time the door was open for awhile.

A. It was open when I went in, and then he closed it.

Q. What did you say about him locking it?

A. No, he didn't lock it.

Q. It was not locked.      A. Yes.

Q. And while you were in there somebody came in there.

A. The men came in there and then while they



(Testimony of Selma Lappi.)

were fixing the pipe he told me to sit down.

Q. Was that before or after he had dressed your neck? [83—37]

A. It was after he had dressed my neck. First he dressed my neck, then the men came in.

Q. How many times did they come in while you were there? A. Once I think; once or twice.

Q. And did they knock when they came in, or did they just come right in? A. Just came right in.

Q. Did you hear Doctor Hall say anything to these men?

A. No. He didn't say anything. I think he said something,—

Q. Did you hear—(interrupted).

A. —but I don't remember what it was.

Q. Do you remember of hearing these men ask the doctor whether—did the doctor say to them to come in? A. Yes, and the doctor said to.

Q. He said for them to come right in? A. Yes.

Q. Do you remember that? A. Yes.

Q. Do you remember hearing the doctor say to them not to knock, to walk right in, "You need not knock"? A. Yes.

Q. "Just attend to your work and come right in"?

A. Yes.

Q. Did you ever hear the name of this other man that was there with Mr. Dundon? A. No.

Q. Did you ever see him since that you remember of?

A. Yes. I think I saw him one time with Mr. Dundon. He was fixing a pipe right close to Ellis' store.

(Testimony of Selma Lappi.)

Q. Did you see the same man there? A. Yes.

[84—38]

Q. Did you know Mr. Crossley? Did you ever know a man by the name of Mr. Crossley?

A. I don't think I do.

Q. You don't know even who he was?

A. I have heard the name.

Q. Did you ever see him, or did you ever talk with him?

A. No. I have seen him on the street, I think.

Q. But you never talked with him and he never talked with you. A. No.

Q. Do you know Mr. Gillette? Have you ever heard that name? A. Yes.

Q. Did you know him?

A. No, I have not known him, but I have seen him on the street.

Q. And you knew who he was. A. Yes.

Q. Did you ever talk with him at all? A. No.

Q. When was the first time you were ever down to this building here and in the office where Mr. Roth is now? A. I wasn't in this room.

Q. Not in this room, but you remember just as you come upstairs there is a door right at the head of the stairs. A. Yes.

Q. You have been in there? A. Yes.

Q. When was the first time you were ever in that room, whether Mr. Roth was there, or whether anybody else was there? A. Mr. Roth was there.

Q. The first time that you went there? A. Yes.

[85—39]

(Testimony of Selma Lappi.)

Q. How long ago is that, about?

A. I think it was about—it was just lately.

Q. About when?

A. It wasn't last week. I don't remember when it was, but it was lately anyway.

Q. Do you remember of being downstairs where a lot of men were that they call the Grand Jury?

A. Yes.

Q. You remember about being there? A. Yes.

Q. Had you talked to Mr. Roth before you talked to these men downstairs? A. Yes.

Q. About how long before that had you talked with him? A. I don't remember.

Q. Had he been up to your house before you came down and talked to these men downstairs?

A. I think he was over there one noon time. Mamma told me about it.

Q. I mean, while you were there.

A. No. He was not over there when I was there.

Q. He never was there when you were there?

A. No.

Q. And the only time that you talked with Mr. Roth, or at least the first time you talked with him was in this office back here.

A. Yes, and I talked with Mr. Roth at home one time.

Q. Afterwards you talked with him at home one time, and was the time that you talked with him up home before or after the time you talked with these men downstairs, the Grand Jury? [86—40]

A. It was afterwards. Yes, it was after.



(Testimony of Selma Lappi.)

Q. And are those times the only times that you have talked to Mr. Roth, or did you talk to him other times?     A. I think that is the only times.

Q. I think you said you might have been up to Doctor Hall's office about a dozen times altogether.

A. Yes, but it might have been a little longer, or not quite that long. I don't remember how long it was.

Q. I don't mean how long at a time; but I mean how many times. I think I understood you to say it was about a dozen times altogether that you were up to his office.

A. It might have been, but I don't remember.

Q. Might it have been less than that or more than that?

A. It might have been more. I am not sure.

Q. And it might have been less?

A. Yes. And it might have been a little more.

Q. Selma, did anything ever happen while you were in Doctor Hall's office like you have been telling us about now on *on* any other occasion that you were there?     A. No.

Q. You say that was the only time you were there alone; the only time you went there that you were there alone.     A. Yes.

Q. You never went there alone.     A. No.

Q. Who were the different people that you went with. You said you were there with your mother and your father and your brother and the little Nordale girl. Was there anybody else? Those were the only people, and you had either one or the other

(Testimony of Selma Lappi.)

of them with you every time you [87—41] *every time you went there except this last time.*

A. Yes.

Q. Now, I don't want to tire you, but I want to go over one feature of this question and ask whether you remember anything else that occurred. You told the jury and told us a little while ago about sitting upon the operating table and his dressing your neck, and after he got all through fixing your neck the next thing he did was to sit down in this chair.

A. Yes.

Q. That is right; there was nothing done in the meantime, and he took you on his lap. A. Yes.

Q. And he said to you that he wanted to see how fat you were, and unbuttoned your drawers.

A. Yes.

Q. And felt how fat you were. A. Yes.

Q. Was there anything done at that time besides his just feeling to see how fat you were?

A. That is all. Then he kissed me right here, and right here (indicating).

Q. While you were sitting in the chair?

A. No.

Q. Well, just a minute. While he was sitting in the chair, and while you were sitting upon his lap, did he do anything besides just feeling to see how fat you were? A. No.

Q. Then after that he asked you to sit on the sofa or on the lounge, or to go over there, and he went over there and he lay down and you lay down, and then he felt you again, [88—42] did he?

(Testimony of Selma Lappi.)

A. Yes.

Q. In the same way he had while you were sitting on the chair?      A. Yes.

Q. Anything else?

A. Yes. Then he kissed me here and he kissed me here (showing).

Q. You mean on the leg right near the knee?

A. Yes.

Q. Then right on the cheek?      A. Yes.

Q. Then what did he do?

A. Then he gave me a piece of candy, and he said I had been a nice girl.

Q. Then what did he do after he had given you the candy?

A. Then I put on my coat, and he told me to come Saturday.

Q. You think you have told us everything that happened there?      A. Yes.

(The Court continues the trial until 10 A. M. Monday, April 19, 1915, and the jury retire, after being admonished in the usual way, in charge of the bailiffs.)

Monday, April 19, 1915, 10 A. M.

Defendant and jury present. Trial resumed.

SELMA LAPPI resumes her testimony on cross-examination.

(Mrs. Lappi, mother of witness, begins to cry, and, on being directed by the Court so to do, withdraws from the courtroom.)

(Mr. MARQUAM.)

Q. Selma, do you know what you are in court here



(Testimony of Selma Lappi.)

for? I mean do you know why you are here testifying, and why we are all [89—43] here? Do you know what we are all doing? (No answer.) Do you know what I mean, Selma? Do you know why you are sitting there now, and being asked questions about what you know about this case? Do you think you do? A. No.

Q. You know Dr. Hall? A. Yes.

Q. Do you see him here? A. Yes.

Q. Do you know why he is here? (No answer.) Do you mean that you don't know? Do you have any idea why he is here?

A. (Nods head in the negative.)

Q. Do you realize, Selma, what it is for a person or a man to be tried before a Court? (No answer.) Do you realize? Do you know what I mean? Do you know what that means? A. No.

Q. You don't know that Doctor Hall is here being tried to find out what he has done in this matter, and that if the things that he is being tried for are found true that he will be punished. Do you realize that, Selma? A. Yes.

Q. Where did you learn that from? Where did you find that out? Do you remember? Did somebody tell you? Just answer the question, if you can; and if you can't, say that you don't know.

A. I don't know.

Q. Do you remember when you were over at Doctor Hall's the last time? A. Yes.

Q. Were you scared or frightened when you were there? A. A little. [90—44]

(Testimony of Selma Lappi.)

Q. Did you go right home from the doctor's office?

A. Yes.

Q. What did you do when you first went home?

A. I went and I told my mamma what he did.

Q. Right away, as soon as you went home?

A. Yes.

Q. Just as soon as you got in the house?

A. Yes.

Q. What did you tell your mamma at that time?

A. I told her that he opened my pants, and he wanted to see how fat I was.

Q. Anything else? Did you tell you mamma anything else just as soon as you got him? (No answer.) Isn't it true that when you went home that you didn't say anything to your mother then until she finally asked you and questioned you? (No answer.) Do you remember what your mother said to you when you went home—the first thing that she said to you when you got home?

A. I don't remember.

Q. Did you speak to your mamma first, or did she speak to you first? A. I spoke to her first.

Q. Just as soon as you got home? A. Yes, sir.

Q. And you went to her and said what you now state? A. Yes.

Q. Are you sure of that? A. Yes.

Q. Did you say anything else to your mother at that time besides what you have already—what you have now said? A. I don't remember. [91—45]

Q. Do you remember what she said? Can you think back to that time and think what your mother

(Testimony of Selma Lappi.)

said to you?     A. I don't remember.

Q. What did she do? If she didn't say anything, what did she do when you said this? (No answer.) Did she keep on asking you questions and talking to you? (No answer.) Or can you think about it? (No answer.) Didn't she say things to you? Didn't she ask you when you went in, what was the matter, or something of that kind, and you said, "Nothing"; didn't you say that?     A. I don't remember.

Q. Just think. You can remember when you went home?     A. Yes.

Q. And got in the house. And just think and see if that is not what you said to your mother; that there was nothing that happened, or you said "nothing happened." See if that is not what you said. (No answer.) Do you think you might have said that?

A. I might have, but I don't remember.

Q. That, you said, was on Friday.

A. Yes. I believe it was on Friday.

Q. And you were to go back to the office the next day.     A. Yes.

Q. Did your mother say that you must not go back the next day?

A. I told her I didn't want to go back myself without my mamma goes, and *he* said I better not go down there.

Q. When did she say that, do you remember? (No answer.) When did she say that, Selma, do you remember?     A. No.

Q. Was that as soon as you got home, or the next day?



(Testimony of Selma Lappi.)

A. I think it was the same day. I don't remember. It might [92—46] have been Saturday, and it might have been Friday.

Q. It might have been Saturday that you said that? A. Yes.

Q. Did you tell your mother that you were to go back again Saturday? A. Yes.

Q. And it might have been at that time that she told you, you say, or it might have been the day you went home? A. Yes.

Q. You don't know. A. No.

Q. Did she talk to you a good deal about what had occurred down at Doctor Hall's office, after you went home? A. Yes.

Q. You say she did? A. Yes.

Q. When did she talk with you?

A. Saturday, and Friday, too.

Q. Friday and Saturday, too? A. Yes.

Q. Did she talk to you any on Thursday about it?

A. I don't remember.

Q. Why do you know that it was on Friday that you went down there?

A. Because I remember it was Saturday. I didn't go to school that day.

Q. That that was the next day after you went there? A. Yes.

Q. That is the reason that you remember that it was Friday. A. Yes.

Q. Who else at that time did you talk with, do you remember? [93—47]

A. I didn't talk with anybody else.

(Testimony of Selma Lappi.)

Q. That is, either Friday or Saturday or Sunday or Monday, or within a few days there, who else did you talk with?     A. I don't remember.

Q. Now, did you ever tell your mamma anything more than what you have told just a minute ago, that the doctor unbuttoned your panties?     A. Yes.

Q. —to see how fat you were?

A. Yes. And I told her that he laid me on the chair and then he laid me on the lounge, and gave me a piece of candy, and he kissed me here and he kissed me there. (Showing.)

Q. That is all you told her?     A. Yes.

Q. Did you ever tell her anything more than that?

A. No.

Q. Did you ever tell anybody else anything more than that?     A. No.

Q. That is all that happened.     A. Yes.

Q. And you told your mamma that the first time you talked with her—all of it?     A. Yes.

Q. Just as soon as you went home.     A. Yes.

Q. You didn't tell her then— If you told her that, then you couldn't have told her when she was talking to you that nothing had happened to you, could you?

A. No.

Q. You said a while ago, as I understood you in answer to my question, if you hadn't said to your mamma when you first [94—48] talked about this thing, that nothing had happened down there. That couldn't be true, could it?

A. No. I went right home and I told her about that.

(Testimony of Selma Lappi.)

Q. You went right home and told her about that?

A. Yes.

Q. The first time you talked with her? A. Yes.

Q. And you told her just exactly what you have told us now just a moment ago. A. Yes.

Q. Do you remember what your mamma said?

A. I think she said, "What did you let him do it for"?

Q. You believe she said that? A. Yes.

Q. When? A. I think it was Friday.

Q. Anyhow, it was the same day that you were down to Doctor Hall's office. A. Yes.

Q. Do you remember of your mother going down to Doctor Hall's office afterwards? Did she tell you anything about that? A. No. She never told me.

Q. Did you go to school Monday? A. Yes.

Q. And you went to school Friday? A. Yes.

Q. There was no school Saturday, and Monday you went to school again. A. Yes.

Q. Did you ever know, or did you know at all at that time, that your mother went down to Doctor Hall's office? A. No. [95—49]

Q. You never heard about that. A. No.

Q. Did you talk to her any Sunday about it?

A. I don't remember.

Q. How many times and how often did you and she talk about it since that time, do you remember?

A. Not very many times.

Q. Did you say, "Very many times," or "not very many times"? A. It was not very many times.

Q. Do you know Doctor Bradley? A. Yes.



(Testimony of Selma Lappi.)

Q. Did you ever talk with her?      A. No.

Q. And you never have talked with her at any time?      A. No.

Q. How do you know who she is?

A. Because I have seen her on the street.

Q. And she has never talked with you.      A. No.

Q. Do you come home for lunch from school?

A. Yes.

Q. Say, after Monday, did your mother tell you, or did you know, that after she had been down to Doctor Hall's office that she had been down there? Did you ever know that?      A. No.

Q. You never knew it up to this time, and you don't know it now, of course?      A. No.

Q. You don't know whether she was ever at Doctor Hall's office.      A. No.

Q. When you went down to Doctor Hall's office, do you remember [96—50] that—were you afraid of this chloroform he used to wipe your neck off with after he had dressed your wound; were you afraid of that when he used that to take off this?      A. Yes.

Q. You were afraid of that.      A. Yes.

Q. Do you remember any time he used that?

A. He didn't use it every day. He only used that twice.

Q. What did he use it for, do you know?

A. Because there was some kind of stuff right around here, and he used to take it off. (Indicates neck.)

Q. And you say he only used that twice.

A. Yes, only twice.

(Testimony of Selma Lappi.)

Q. Do you remember when that was?

A. I don't remember.

Q. But you remember it was only twice. How do you remember that?

A. Because one day I know there was some kind of stuff there and he had to take it off, and the next day I remember he took it off, too.

Q. One day, and then the very next day?

A. I don't know if it was the very next day or not.

Q. Do you remember what you did on those occasions? A. I cried.

Q. What else? Did you say anything.

A. I told him not to do it.

Q. Anything else? A. I think that is all.

Q. Just cried and told him not to do it. Where were you sitting or what were you doing in the office?

A. There was a table there, and I sat on that.

[97—51]

Q. You were sitting up on the operating-table.

A. Yes.

Q. And he was dressing your neck. A. Yes.

Q. Did you sit right there when he was doing this?

A. Yes.

Q. Were you sitting up all the time? A. Yes.

Q. You don't remember what you said at all, except not to do it.

A. Yes, and I cried a little. I told him not to do it, and I cried.

Q. That was all that you did.

A. I think that is all.

Q. Do you remember who was there at that time,

(Testimony of Selma Lappi.)

or at any of these times?

A. I think my brother was once. No, my brother wasn't. I think it was my mamma both times.

Q. You think it was your mamma both times.

A. Yes.

Q. Do you remember about when that was? I mean by that; was it towards the last time, or near the last time, that you went there, or the first time that you went there, or when was it? You went to Doctor Hall's office a good many times.

A. Not so very many times.

Q. You said the other day you thought about a dozen times—about a dozen times. A. Yes.

Q. Was it the first, second, third or fourth time, or towards the last—the ninth, tenth, eleventh or twelfth time? [98—52] Can you tell us when this happened, about? A. No.

Q. Do you remember upon at least one of these occasions when chloroform was being used upon your neck that you not only cried, but that you screamed and said to Doctor Hall, "Don't spank me. Don't spank me. I will be good. I will be a good girl." Do you remember saying that? (No answer.) Think, and see if you can remember that.

A. I don't think so.

Q. Now, that I call your attention to it, don't that make you remember that at one of those times when chloroform was used upon your neck and you found out what it was, that you repeated just what I have recited, "Don't spank me. I will be a good girl," or something to that effect? Don't you remember say-



(Testimony of Selma Lappi.)

ing that?      A. No.

Q. Don't you remember when that occurred that your held your finger over your nose and over your mouth?      A. Yes.

Q. And didn't breathe?      A. Yes.

Q. And almost strangled?      A. Yes.

Q. Do you remember about that?      A. Yes.

Q. Why did you do that?

A. Because it made me go to sleep a little, and it smelled bad.

Q. And you didn't want to smell it?      A. No.

Q. And when you did get the smell of it, you held your nose. And do you remember getting very red in the face and [99—53] holding your breath?

A. Yes.

Q. Don't you remember further upon at least one of these occasions of saying what I have just asked you about, "Don't spank me. Don't spank me. I will be good," something to that effect? Do you remember that?      A. I don't remember.

Q. It might have been, you think?

A. It might, and it might not.

Q. If it did happen, why would you think of that? The doctor never spanked you, did he?      A. No.

Q. You say it might have happened. If it did, why would you say that, do you think?

(Plaintiff's attorney objects to question; question withdrawn.)

Q. Selma, tell me this: Has your mamma not punished you at home, spanked you very much?

A. No.

(Testimony of Selma Lappi.)

Q. She never has?      A. A few times.

Q. Just a few times?      A. Yes.

Q. What was it that frightened you on these occasions when the doctor dressed this neck? Did you know the chloroform bottle when you saw it?

A. Yes.

Q. Where the doctor used to put a drop or two on cotton on your neck, you knew it when you saw it.

A. Yes.

Q. You got scared when you saw the bottle.

A. Yes. [100—54]

Q. You had remembered it from the hospital when they gave it to you.      A. Yes.

Q. And sometimes it was the looks of the bottle and sometimes the smell of the chloroform.

A. Yes.

Q. And you would get a faint smell of it and that would scare you.      A. Yes.

Q. Do you remember upon several of those occasions, or at least upon some of them, when you would see the bottle or get the fumes of the chloroform, that you not only held your breath but straightened back and fell back on the operating-table? Do you remember that?      A. Yes.

Q. Fell right back on the operating-table until the chloroform would be put away?

A. Yes, and I would hold my eyes so it wasn't going to smart. I would do like this (showing).

Q. You do remember stiffening yourself up and crying and trying to prevent, to protect yourself from any of these fumes, and on one or two occasions

(Testimony of Selma Lappi.)

you fell right back on the operating-table. Do you remember that? A. Yes.

Q. You think that upon these occasions your mother was there twice. Aren't you mistaken about that?

A. I think so. I think she was there, or my papa might have been there.

Q. Wasn't your papa there once when that occurred?

A. Yes, he was there once, and mamma was there once.

Q. Do you remember that your papa upon that occasion when you [101—55] were crying and doing these things that you were telling about, had to take hold of you and shake you and say that you must stop that. Do you remember him telling you that; that the doctor wouldn't hurt you, and was only doing what was necessary to be done? Don't you remember your papa doing that? A. No.

Q. You don't remember that. Just think. It is probably hard for you to remember all these things. (No answer.) You say once your papa was there and once your mamma was there.

A. My papa was there twice, but only at one time when papa was there he gave me chloroform; that was all.

Q. Is that one of the two times you were talking about?

A. There were three times, because we went over there one time, and the next day I had to go to the hospital. That was when my neck was going to be operated on.



(Testimony of Selma Lappi.)

Q. That was three times that you went through this experience.     A. Yes.

Mr. ROTH.—That was not what she said. She said her papa was there three times.

Mr. MARQUAM.—Q. Explain that again.

A. My papa was there three times, but only one time when papa was there did he give me chloroform.

Q. How many other times was there chloroform around there besides the time that your papa was there?     A. I don't remember.

Q. You said a while ago that your mother was there you think twice. Now, would that be three times altogether?

A. My mamma was there with me once when he gave me chloroform, and when—(interrupted).

Q. Listen. You don't refer to the time over at the hospital?     A. No. [102—56]

Q. I am talking about his office.     A. Yes.

Q. Just once, and once while your papa was there.     A. Yes.

Q. That was twice.     Yes.

Q. Was that all the times that you say he gave you chloroform?     A. Yes.

Q. When you say he gave you chloroform, you mean he cleared the stuff off of the neck that was there. That is what you mean by that.     A. Yes.

Q. And there was only twice during all the time that you were there at the office that that occurred.

A. Yes.

Q. You know Mrs. Hall, Doctor Hall's wife?

A. Yes.

(Testimony of Selma Lappi.)

Q. Don't you remember this happened when Mrs. Hall was there?     A. Yes.

Q. That would be another time.     A. Yes.

Q. That would be three times.

A. She was in there when my papa was there, at the same time.

Q. Wasn't you there in the office, Selma, when nobody but you and Mrs. Hall was there, when the doctor used this chloroform, and you held your hands over your nose and screamed and cried and fell back on the table? Do you remember that?

A. I don't remember.

Q. But you do remember that Mrs. Hall was there on one of these occasions, but you think it was while your papa was there. {[103—57]}

A. Yes, I remember one time. I don't think my mamma was ever there when he gave me chloroform, but I think Mrs. Hall was there when I was down there and my brother was there and that he gave me chloroform.

Q. Altogether how many times would that be; would that be three times?

A. Twice. My mamma wasn't there when he gave me chloroform.

Q. Your mamma was there once when he gave you chloroform, and your papa was there once when he gave you chloroform. Was it on one of these occasions that Mrs. Hall was there, as you remember it?

A. I don't remember.

Mr. ROTH.—Pardon me. She has just stated that she didn't think her mother was there at all

(Testimony of Selma Lappi.)

when she got the chloroform. That was her last answer.

Mr. MARQUAM.—Q. Was your mother ever there when you say the doctor gave you chloroform?

A. I think not,

Q. You thought a while ago that you did think so.

A. Yes.

Q. And you think now that she was not.

A. Yes.

Q. We want to get the truth, Selma, that is all. As I understand now, your father was there on one occasion. A. Yes, sir.

Q. Who else was there with him at that time besides yourself and Doctor Hall?

A. My brother and my papa was there and me and Doctor Hall.

Q. Your brother and yourself and your father were there and Doctor Hall on this one occasion.

A. Yes. [104—58]

Q. And on the other occasion who else was there?

A. I think it was Mrs. Hall and me and—

Q. And who else? You don't remember? Can't you think who else was there when Mrs. Hall was there? (No answer.) Are you not mistaken about the number of times that you say the doctor gave you chloroform; that it was a great many more times, whenever it was necessary to take off these bandages that were sticking to your skin here? Didn't he have to use chloroform to take them off?

A. No. He just pulled it off with his hand. It was kind of sticky stuff.



(Testimony of Selma Lappi.)

Q. The last time that you were there, just think and tell us just exactly what happened on that occasion about the use of chloroform. Did the doctor use some chloroform the last time you were there to clean your neck off?

A. The day when he opened my panties?

Q. That is the time we are talking about.

A. No.

Q. While he was dressing your neck?

A. No, he didn't need to do that. I didn't need to have no bandages around at all, or he didn't need to put any kind of stuff on me at all.

Q. What did he do?

A. Well, just a handkerchief around is all.

Q. Was there a handkerchief on your neck when you went there?      A. Yes.

Q. There was not any dressing or anything else on the neck at all?

A. No, just a handkerchief.

Q. Do you remember, do you know what kind of stuff it was that the doctor put on your neck after he dressed it that [105—59] would stick to your skin? Do you know what that was?

A. I know the name of it, but I forget.

Q. Adhesive tape?      A. Kind of yellow-like.

Q. That would stick to the skin?      A. Yes.

Q. Kind of like glue?

A. He didn't put that on that day.

Q. When he dressed your neck here the last time you were at the office, don't you remember of part of that tape being fastened to your hair in here under

(Testimony of Selma Lappi.)

the handkerchief, and that was cleaned off, and chloroform was use to do that? Don't you remember that? Just think and see if you can remember that. Can you think of that?

A. No. I can't remember.

Q. Do you remember at any time you were sitting up on a table like this—the operating-table?

A. Yes.

Q. And the doctor would be working around your neck, that when you would see this chloroform bottle you would stiffen yourself out and throw yourself right out on the table? A. Yes. I think I did.

Q. Do you remember upon one occasion at least of that kind that the doctor, to get you to sit up, had to hold his hand like this on your stomach (showing) and raise you up, force you up like this? A. Yes.

Q. Didn't he do this upon this occasion that you were there the last time?

A. The time he opened my panties.

Q. That is the time, the time you were there the last time [106—60] when he was dressing your neck. Do you remember that?

A. No. He didn't do that.

Q. You are sure of that? A. Yes.

Q. Do you remember at any time you say he gave you chloroform of being sick at the stomach, of being a little sick at your stomach, and your stomach hurting you? Do you remember that?

A. I think so. Yes.

Q. Do you remember, when you complained of feeling that way, that the doctor massaged your

(Testimony of Selma Lappi.)

stomach? Do you know what massage means?

A. Yes.

Q. Did the doctor ever do that when you felt—  
(interrupted). A. No.

Q. He didn't? A. No.

Q. Are you sure of that, Selma? A. Yes.

Q. Did Doctor Hall ever give you any candy except upon this occasion that you are talking about?

A. Yes.

Q. Mrs. Hall gave you candy, did she, when she was there? A. Yes.

Q. How many times did you see Mrs. Hall there?

A. Quite a few times. Not so very many; once or twice.

Q. What?

A. I think it was about four or five times.

Q. Every time she was there and saw you would she give you candy? A. No. [107—61]

Q. How many times did Mrs. Hall give you candy? A. About twice.

Q. How many times did the doctor ever give you candy, do you remember? A. One time.

Q. Just once? A. Yes.

Q. Selma, do you remember who you have ever talked to about this matter besides your mother?

A. Only my mamma.

Q. Never to anybody else? A. No.

Q. What do you mean; that you never have talked to anybody else besides your mother about it?

A. I only talked to my mamma.

Q. Do you mean before you came into court, or



(Testimony of Selma Lappi.)

that you have only talked to your mother?

A. The first time I came home I told her about it.

Q. Just now you said you never talked to anybody about it except your mother. You remember you were here last Saturday.

A. Yes. And I talked to Mr. Roth about it too.

Q. When first?

A. I don't remember. It was lately.

Q. Where was this? A. At his office.

Q. Anywhere else? A. I don't remember.

Q. Anybody else that you ever talked to? Did you ever talk to your papa about it? [108—62]

A. No.

Q. Has your papa been home since that time?

A. Yes, he was home. I think my mamma talked to him about it.

Q. Did he ever ask you anything about it?

A. No.

Q. He never said a word to you? A. No.

Q. Nobody ever talked to you except your mother at home. A. Yes.

Q. How long was your papa home after you were down at the office—was he home the day you went back up there and told your mamma? A. No.

Q. Where was he then? A. He was in Ruby.

Q. He came back after that and you saw him?

A. Yes.

Q. Did he ever ask you anything about it?

A. No.

Q. Did you hear your mamma tell him anything about it?

(Testimony of Selma Lappi.)

A. I think she told him about it.

Q. Did you hear her tell him about it?      A. No.

Q. How do you know that?      A. I just think so.

Q. He never said anything to you about it, never asked you any questions about just what occurred, or anything about it.      A. No.

Q. Do you know where he is now?

A. Tolovana. [109—63]

Q. I want to ask you about a statement you made the other day about this couch. You said to the jury that Doctor Hall lay down on the couch.      A. Yes.

Q. Now, just what do you mean by that—how did he do that?

A. He just lays down like that (showing).

Q. This is the corner of that room, and a wall here (indicating). Is there a couch right along in the corner?      A. Yes.

Q. Is there a lot of pillows upon it?      A. Yes.

Q. Do you mean that he lay down upon that, or sat down on the couch and leaned up against the pillows?      A. He sat down like this (showing).

Q. Did he sit down upon this couch and lean back on these pillows, or lie the full length of the couch?

A. No, he was just like this (showing).

Q. With his head back on the pillows.      A. Yes.

Q. He was sitting down on the couch.

A. Yes. He went like that, I believe (showing).

Q. You told the jury you were lying down on the couch. Weren't you sitting down on the couch leaning up against the pillows, too?      A. Yes.

Q. Selma, did you ever tell this to your mother;

(Testimony of Selma Lappi.)

that while you were down at the office that Doctor Hall opened your little panties and kissed you on the bottom?     A. Yes.

Q. When did you tell her that?

A. I told her the same day. [110—64]

Q. Was that true?

A. Yes. Right here and right here (indicating).

Mr. ROTH.—She didn't understand your question.

Mr. MARQUAM.—Q. I asked you if you ever used those words to your mother, that I just now repeated to you, do you remember?

(Objection and suggestion by plaintiff's attorney that witness does not understand the question.)

Q. Let me examine the witness. Do you remember if you ever used these exact words to your mother, not words meaning the same thing, but these exact words, "that Doctor Hall opened my drawers or panties," either one or the other, "and kissed me on my bottom," Did you use those words to your mother in telling about this, or did she ever use those words in your presence to you?

A. I told her he unbuttoned my panties and kissed me here and he kissed me here (showing).

Q. You never told her anything else.

A. Well, and I told her he gave me a piece of candy, and he feelled me all around, and lay on the couch and I lay down too, and—(interrupted).

Q. What else, if anything?

A. I don't remember.

Q. Well, then, would you say that you did or did



(Testimony of Selma Lappi.)

not say to your mother at any time that Doctor Hall unbuttoned your clothes, or unbuttoned your drawers, and kissed you on your bottom? Did you ever say that to her? (No answer.) Try and think and tell us just exactly whether you did or didn't.

A. Told her that he unbuttoned my panties.

Q. You understand the question I asked you. Say whether you did say that or didn't say that to your mother, if you can. [111—65]

(Plaintiff's attorney desires that question be re-  
eatepd.)

Q. This is what I wish you to answer: If you ever told your mother that Doctor Hall had opened your panties and kissed you on the bottom, just in those words. A. Yes.

Q. Did you tell her that in those exact words?

A. Yes.

Q. When did you tell her that?

A. I told her the same day when I got home.

Q. Was that the first thing that you said to her?

A. Yes.

Q. Just in those exact words? A. Yes.

Q. Why did you tell us a while ago that you went home—why didn't you tell me a while ago when I asked you what you said, why didn't you tell me that?

A. I went home and I told her that he unbuttoned my panties and he put me on the chair and he sat down too and feeled me all around, and he lay down on the lounge and did like this (showing),—sat down on the lounge like that and he feeled me all around,

(Testimony of Selma Lappi.)

and he kissed me here and he kissed me here (showing), and he told me I was a nice girl, and he gave me a piece of candy.

Q. That was just what you told your mother.

A. Yes.

Q. And when did you tell her that Doctor Hall opened your drawers or panties and kissed you on your bottom? When did you tell her that, do you remember? (No answer.) Did you ever tell her that? . (No answer.)

Mr. ROTH.—Here is the proposition—(interrupted).

Mr. MARQUAM.—I object to counsel making explanations in the [112—66] presence of the witness.

The COURT.—Go ahead.

Mr. ROTH.—Here is the proposition: He puts two propositions, one of which she has been answering right along.

(Argument.)

The COURT.—(To Mr. Marquam.) You may ask the question again.

(Mr. MARQUAM.)

Q. Do you understand the question I have been asking you,—do you understand what I was asking you just a minute ago? If you don't understand what I mean, then you tell me so I can make it plain to you. I want you to tell us now—

A. I don't understand.

Q. I will try and make it plain to you. Tell us whether or not you told your mother when you went

(Testimony of Selma Lappi.)

home that Doctor Hall had opened your panties, or you may have used the word “drawers”—

The COURT.—Let that stand as one question.

Mr. MARQUAM.—I don’t want to let it stand as one question. I am asking her if the statement was just as I put it. I have every reason to ask that question in the words I have put it. When I am asking whether a conversation or statement was made I shouldn’t be compelled to ask her whether she said a part of it, but I have a right to know if that statement was made.

The COURT.—Suppose you try her by asking her about one part of the statement, and then the second part.

Mr. MARQUAM.—That is not what I want. We have good reason for asking the question in just the words that I put it in. I don’t care to discuss the reason now, but the Court will understand that if a dispute arises as to whether or not a certain statement was made, the Court can surmise why I am asking this question. I should not be compelled to [113—67] disclose my purpose.

The COURT.—You will not be compelled to You may ask your question.

(Mr. MARQUAM.)

Q. Answer this question, if you can: whether you told your mother on the day that you went home, or any subsequent day, that Doctor Hall opened your panties and kissed you on your bottom.

A. Yes, I told her that.

Q. You told that to your mother? A. Yes.



(Testimony of Selma Lappi.)

Q. When did you tell her that?

A. The same day.

Q. After you had told her these other things that you have told us about?

A. I told her those first. I told her that he opened my drawers, then he laid me on the chair and he laid me on the lounge, and he kissed me here and he kissed me here (showing) and then he gave me a piece of candy. That is just what I told her.

Q. And you say that you did tell your mother that he had opened your drawers or your panties and kissed you on your bottom. A. Yes.

Q. Selma, can you give us any idea how many times you have made this statement as to what happened down there to your mother or to Mr. Roth or to anybody else,—how many times have you repeated it?

The COURT.—Do you mean here in the court-rooms?

Mr. MARQUAM.—Q. No, altogether from the time that you first went home and up to the present time, how many times do you think you have been called upon to tell that? [114—68]

A. I don't remember.

Q. You have no idea? A. No.

Q. There is just one thing I want to make clear. You told me a while ago that you remembered when you were over in the hospital when you had an operation performed. A. Yes.

Q. Put back your hair. If there is no objection to the child showing this cut upon her neck. Is this

(Testimony of Selma Lappi.)

the cut that the doctor was dressing? (Indicating.)

A. Yes.

Q. Was there any on the other side? A. No.

Q. When this operation occurred the doctor gave you chloroform and you went to sleep. A. Yes.

Q. And it was put right over your nose—something was put over your face? A. Yes.

Q. That was not what you meant by the doctor giving you chloroform in the office?

A. No. He just took some chloroform and rubbed it on my neck.

Q. Took a little cotton and put some on and rubbed it over to take this stuff off. That is what you mean? A. Yes.

Mr. MARQUAM.—That is all.

Redirect Examination.

(By Mr. ROTH.)

Q. Did you understand what the gentleman meant when he asked you if you told your mother that Doctor Hall kissed you on the bottom,—do you understand what kissing on the bottom [115—69] means? A. Yes.

Q. What does that mean? A. On the skin.

Q. This part of the body back here (indicating). do you ever hear that called the bottom? Where you sit down,—did you ever hear that called the bottom? A. Yes.

Q. Did you tell your mother that Doctor Hall kissed you on the bottom, the sit-down place?

A. No.

Q. You never told your mother that.

(Testimony of Selma Lappi.)

A. He never kissed me there.

Q. He never kissed you there at all. Now, Selma, I want you to show me here just exactly how Doctor Hall lay down on that lounge. You come down here, and say this was the lounge; get down and show us. Get down—

Mr. MARQUAM.—Let the child do that.

Mr. ROTH.—I am examing this witness. Q. Show me how Doctor Hall lay down on the lounge.

A. Like this (showing).

Q. Where were his feet on the lounge?

A. They were hanging down.

Q. Where were you?

A. Right here (showing).

Q. Where was your head?

A. My head was right here (showing).

Q. Where was Doctor Hall? I will ask you, was one of his arms around you when he was leaning down on the lounge? A. I don't remember.

Q. When you talked about this being a lounge, was that the [116—70] operating-table that you were talking about? A. No.

Q. When you went home that first day, did you tell your mother when you said he felt you all around,—did you tell your mother that he put his hand on you here (showing)? When you first came home, did you tell her that? A. Yes.

Mr. MARQUAM.—I think that counsel should not put the questions in that leading way and demonstrate by these motions. It is easy enough to get answers from this child by suggestion, and I don't



(Testimony of Selma Lappi.)

think that is proper examination.

The COURT.—I do not expect counsel to make questions too leading, but the jury and the Court understand that in examining a witness of this age it is not possible to pursue the same line of examination that you would with an older witness.

Mr. ROTH.—That is exactly what the witness did.

Mr. MARQUAM.—On your suggestion, yes, but she never did it since.

Mr. ROTH.—That is what the witness did when Mr. Marquam was examining her; that is why I remembered it.

The COURT.—Proceed with the examination.  
(Mr. ROTH.)

Q. Selma, you told Mr. Marquam that you talked to Mr. Roth in his office. Do you remember whether or not you talked to Mr. Roth up at your house? Did you see me up at your house? A. Yes.

Q. Did you talk to me there, or did I ask you any questions there at your home? (No answer.)

Mr. ROTH.—Well, that is all right. I guess the child is tired. That is all.

Further Cross-examination.

(By Mr. MARQUAM.)

Q. Did Mr. Roth ever talk to you at your house? [117—71] A. I think he did.

Q. You say that you think he did. Don't you remember whether he did or not, clearly?

A. Do you mean up there?

Q. Yes, at your house. (No answer.) What do you think about it? (No answer.)

(Testimony of Selma Lappi.)

Mr. MARQUAM.—Are you willing to stipulate what the fact is?

Mr. ROTH.—Yes. I talked to her up there. At least, I talked with her up there after I had seen her at the office.

Mr. MARQUAM.—That is all.

Mr. ROTH.—That is all.

(Five minute recess, jury in charge of bailiffs.)

After recess; jury and defendant present; trial resumed.

**[Testimony of Mrs. John Lappi, for Plaintiff.]**

Mrs. JOHN LAPPI, a witness for plaintiff, after being first duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. ROTH.)

Q. What is your name? A. Mrs. John Lappi.

Q. Where do you reside? A. In Fairbanks.

Q. Whereabouts in Fairbanks do you reside?

A. On 11th and Cushman Streets.

Q. Where did you live before coming to Fairbanks? A. On Fairbanks Creek.

Q. How long did you live on Fairbanks Creek?

A. Since the spring of 1906.

Q. What was your husband engaged in on Fairbanks Creek? A. He was mining, operating.

Q. On what part of Fairbanks Creek? [118—72]

A. On several different claims.

Q. At several different places on the creek?

A. Yes.

Q. How many children have you?

A. I have two.

Q. Is Selma Lappi your daughter? A. She is.

(Testimony of Mrs. John Lappi.)

Q. You have a son, too?      A. I have.

Q. Is the son older or younger?

A. He is two years younger.

Q. How old is your daughter Selma?

A. She is nine the 25th of July, 1914.

Q. She will be ten next July?      A. Yes.

Q. Did you have occasion to have her neck treated some time in 1914?      A. I had.

Q. What was the matter with her neck?

A. Enlarged glands.

Q. Where did you take her to have her treated?

A. I took her to Doctor Hall's office some time last spring to have him examine her neck.

Q. Who was with you, if anyone, at that time?

A. Just my daughter and I the first time.

Q. Did you make arrangements at that time with him for having the child treated?

A. I did, but I postponed it. I decided not to do that until later, or in July.

Q. When were final arrangements made with Doctor Hall, if they were finally made? [119—73]

A. About the 23d of July when I came in from Fairbanks Creek.

Q. Who was with you at the time at Doctor Hall's office that you made final arrangements with him?

A. I was just there with my daughter.

Q. What financial arrangements were made with Doctor Hall at that time?

A. Well, we were to have that neck operated on or lanced on the 25th day of July, and he was to get a hundred dollars for that operation and the treatment.



(Testimony of Mrs. John Lappi.)

Q. Did you pay him?

A. We paid him sixty dollars just before—that was before my husband went down to Ruby.

Q. What day did your husband go to Ruby?

A. On the 24th day of September.

Q. Was that operation performed on the glands of Selma?

A. Yes, on the 25th day of July. It was just lanced, that swelling.

Q. It was lanced on the 25th of July?      A. Yes.

Q. What else was done?

A. Then later it was operated on, and she took chloroform.

Q. When was that?

A. That was—I don't just remember the date, but it was the first part of August, probably two weeks after the first time.

Q. Where did this operation take place?

A. At the St. Joseph's Hospital.

Q. Where was the lancing done?

A. At the same place.

Q. How long did Selma remain at St. Joseph's Hospital after the operation?

A. I think five days. I was there with her.

[120—74]

Q. How long did she remain there?

A. Just the five days.

Q. You took her away with you when you left?

A. Yes, I took her away.

Q. Where did you take her?

A. I took her home then.

(Testimony of Mrs. John Lappi.)

Q. Out on Cushman Street, where you live now?

A. Yes.

Q. Now, what treatment, if any, did the child receive with reference to the healing of the wound caused by this operation, after you had brought her home?

A. Well, I took her to Doctor Hall's office every day then to have it treated. He kept the wound open and he dressed it every day and bandaged it.

Q. For how long a time?

A. Until the 24th day of September.

Q. You say you took her there?

A. I took her there at that time, but it was before the last operation. She stayed with Mrs. Nordale six or seven days when I went out to the creek, and then little Anita Nordale went down with her at that time?

Q. After the final operation?

A. Yes, I took her there myself.

Q. Did you take her there yourself every time that she went there?

A. Not at all times I didn't.

Q. Explain that to the jury so they will understand it.

A. I took her there until—well, I took a trip out to Fairbanks Creek and I left her with the Sisters at the hospital for four days, and when I came back from there I took her home again with me, and then I went down with [121—75] her until I stepped on a nail and my foot was sore, and I sent my little

(Testimony of Mrs. John Lappi.)

son with her, and I think probably about three times she went there alone.

Q. Alone?      A. Alone, yes.

Q. Well, when was the last time that she went there?      A. The 24th day of September.

Q. How do you know the date?

A. Because that was the day my husband left town for Ruby.

Q. Left Fairbanks to go to Ruby?

A. To go to Ruby, yes.

Q. Do you know what day of the week it was?

A. I think it was on Thursday, the 24th day. We could look in a calander and see that.

Q. You think it was Thursday?

A. Well, the 24th day.

Q. The 24th day of September, 1914.

A. Yes, sir, 1914.

Q. Who went with her to Doctor Hall's office that day, if you know.      A. No one.

Q. She went alone.

A. She went alone, because the little boy of mine—I wanted him to go, being I was suspicious of gossip.

Q. You say you wanted the little boy to go.

A. Yes.

Q. But he didn't go.

A. He cried and said he wanted to play with the boys, and I let her go alone.

Q. All right. Now, what time did she leave the house on that day? [122—76]

A. It was after school. I think it was just about



(Testimony of Mrs. John Lappi.)

three o'clock. The child got off from school some time past 2, or some time about a quarter to 3.

Q. That was last year.

A. That was last year. Yes.

Q. Did she come home before she went to the doctor's office from school? A. She did.

Q. How long did she remain home before she started for the doctor's office?

A. Just a few minutes for me to get her ready to go down.

Q. How long was she gone from the house before she came back?

A. Just about half an hour, or probably not that long; but I think it was just about half an hour.

Q. That she was gone altogether?

A. That she was gone.

Q. You saw her appearance when she got back.

A. Yes.

Q. What was her appearance when she got back?

A. She was very, very excited.

Q. Well, what did she say to you?

A. She said to me: "My darling mamma. I am not going down again."

Q. Go ahead and state everything that she said to you.

A. She didn't have the door hardly shut when she said that, and she didn't have her coat off, that is, her rain coat. She said, "My darling mamma. I am not going down again." I said, "Why?" And she said Doctor Hall took her on his lap and opened her little clothes and was feeling her. And I said,

(Testimony of Mrs. John Lappi.)

“Is that so?” And she said, “Yes; Mamma dear.”

[123—77] And I was almost in hysterics. (Cries.)

Q. Is that all she told you at that time?

A. At that time I said, “Where?” And she showed me where he felt her, and that was all at that time.

Q. Where did she show you?

A. She showed me where it was, all over here (showing), and at her little person, down on her person. (Cries.)

Q. Did you afterwards go to Doctor Hall’s office?

A. Not that day, Mr. Roth. I was crazy. I walked the floor three days and four nights without a bit to eat. (Cries.)

The COURT.—The question was; Did you go that day? And you answered it by saying that you did not.

A. Not that day.

The COURT.—Just answer his questions, just what he asks you.

(Mr. ROTH.)

Q. What day did you go? A. On Monday.

Q. What time of day on Monday did you go there?

A. That was a little before 10 o’clock.

Q. In the morning? A. In the morning, yes.

Q. Was Doctor Hall in his office when you got there? A. Not at that time.

Q. Did you leave his office? A. I did.

Q. Where did you go?

A. Down to the postoffice, and I returned—went back to Doctor Hall’s office.

(Testimony of Mrs. John Lappi.)

Q. Was he there when you got there?      A. No.

Q. What did you do when you got there? [124—  
78]      A. I sat there in the rocking-chair.

Q. In which room?      A. In the sitting-room.

Q. Did you see Doctor Hall?

A. Yes.    A few minutes after I had been there he came in.

Q. Describe what occurred when Doctor Hall came.

A. Excuse me a minute. My heart is in my throat.

Q. Will you have a drink of water?

A. If you please. (Takes a drink.)

Q. Where did Doctor Hall come from when you first saw him?

A. I don't know. He opened the door.

Q. Which door?

A. The sitting-room door from the outside and he came in.

Q. Now, just tell this jury what his appearance was when you first saw him.

A. He was very pale, and he didn't come in like he used to do. He used to come in and open the door and say, "Good morning." That day he opened the door very little. He said to me, "Good morning." I didn't answer. He said something else, and I didn't answer. And then I told him, I said, "What do you mean?" He said, "What do I mean?" I said then, "When you tackle an innocent child?" (Cries.)

Q. What did he say then?

A. He said, "tackling an innocent child?" I said,



(Testimony of Mrs. John Lappi.)

“Yes. When you go and open her drawers and go to feeling her.”

Q. Well, what did he say?

A. He said, “That is a lie.” I said, “My child don’t lie,” and she don’t.

Q. What else did he say?

A. He came to me and said, “Sh, Mrs. Lappi, not so loud.” I told him I wasn’t afraid of anybody, “I know what I am saying.” [125—79]

Q. What did he say further?

The COURT.—Mrs. Lappi, keep quiet, and please don’t speak so loud, and take your time in answering the questions, and answer only the questions which the district attorney asks you.

WITNESS.—Your Honor, you must excuse me.

The COURT.—But you must control yourself when giving your testimony.

WITNESS.—I must, yes.

(Mr. ROTH.)

Q. What did the doctor say? Was there anything said upon the subject of Selma being fat?

A. Yes.

Q. What was said about that at that time?

A. Well, I told him that Selma said to me that he felt her all over and wanted to see how fat she was getting, and I said that he kissed her.

Q. Did you say where he kissed her? Where did you tell him?

A. I think I said that he kissed her little bottom. But later she told me it was a little above her knee that he kissed her.

(Testimony of Mrs. John Lappi.)

Q. Well?

A. And he said to me, "She lies, because I was only feeling her arms and all over here (showing). I said, "You are lying. My child don't lie."

Q. What else occurred?

A. He opened the door and he said he wanted some witnesses, or to go to Mr. Crossley. He opened the sitting-room door that goes in the hallway and told me to go to Mr. Crossley. I said, "Yes. I am not through with you." And we both stood [126—80] there in the hallway, and I pointed my finger at him and I said, "Old man, you wouldn't be president of these lodges very long if I can help it." He shivered and went in the sitting-room, and I kept on talking, that if he ever tackled my child, I would shoot him, and I wanted to shoot him then, but my children need me.

Q. Never mind about that.

The COURT.—Just answer the questions.

Mr. ROTH.—Q. Then did you leave?

A. I kept on talking, and on the steps I said, "You tackle some older people, and leave the innocent children alone," and I warned him not to ever speak to my child, or ever lay his hand on my child; and not an answer from him.

Q. Is that the last time you ever talked to Doctor Hall? A. That is the last time.

Q. Did you settle for the balance of the bill?

A. No. He never presented the bill.

Mr. ROTH.—Now, you may cross-examine.

(The Court takes a recess until 2 P. M. to-day, and the jury retire in charge of the bailiffs, after having been admonished as usual by the Court.)

Monday, April 19, 1915, 2 P. M.

Jury and defendant present. Trial resumed.

Mrs. JOHN LAPPI resumes her testimony.

Cross-examination.

(By Mr. MARQUAM.)

Q. Mrs. Lappi, how old did you say your child was?

A. She was nine years old the 25th of July, 1914.

Q. Where was she born?

A. On Dominion Creek, Yukon Territory.

Q. In the Dawson country?

A. Yes, sir. [127—81]

Q. When did you first move down here to Fairbanks? A. That was the spring of 1906.

Q. And Mr. Lappi, since that time, has been engaged, to a considerable extent, in mining on Fairbanks Creek? A. He has.

Q. And you have been out there part of the time?

A. I have.

Q. And the children have been out there, too?

A. Yes,

Q. When did you first meet Doctor Hall, or know him, that is, in a professional way?

A. I think it was in March, last winter, and year ago this March, the first I ever saw him. That was in his office.

Q. The cause of your seeing him at that time was by reason of your taking your daughter up there?

A. Yes.



(Testimony of Mrs. John Lappi.)

Q. For consultation or advice as to what ought to be done?     A. Yes.

Q. And he advised, at that time, that an operation ought to be performed, did he not?     A. Yes.

Q. And you then, after that, moved out to Fairbanks Creek?     A. We did, yes.

Q. Was there any special reason at that time for not following the doctor's advice?

A. She was not sick from it. They were not bothering her, only they were just there.

Q. You decided to await developments, and see whether it would get worse?

A. Yes, sure. [128—82]

Q. It did get worse, didn't it?

A. Yes, it did, when we moved out to the creeks.

Q. And the glands in the throat became very much swollen and inflamed and there was a large swelling here (indicating), was there not?     A. Yes.

Q. And at one time when Dr. Hall was out on Fairbanks Creek, being called out there to attend some person who was injured, Mr. Lappi called him in?

A. Yes, sir.

Q. Were you there at that time?     A. I was.

Q. And he advised that the child be immediately brought to town for an operation?

A. He did, yes.

Q. It was some time after that, however, when the child was brought in?

A. Yes. That was about, I think, two weeks afterwards, probably ten days of two weeks, I don't remember the time.

(Testimony of Mrs. John Lappi.)

Q. Then the child was taken to St. Joseph's hospital?

A. Yes. No, two days after we came into town.

Q. Dr. Hall said that an operation was necessary immediately and wanted, in order to perform the operation, to give an anesthetic, the first time, did he not?

A. Yes, although he thought it was not necessary the first time.

Q. Wasn't the fact that an anesthetic was not given except locally—(interrupted).

A. Yes.

Q. —due to your objection to it? A. Yes.

Q. And her neck was lanced and only a local anesthetic used, injected into the neck so as to deaden the pain? [129—83] A. Yes, sir.

Q. The treatment by reason of that illness didn't affect the purpose, it didn't seem to improve as rapidly as possible?

A. He thought so, but it didn't look like it was.

Q. So it became necessary in his opinion afterwards to go deeper into the throat and to remove all infection that was there? A. Yes.

Q. Were you present when the first operation was performed? A. I was.

Q. Who else was present?

A. Mr. Nordale was over there, and—(interrupted.)

Q. How long after the first operation was it, before the second operation took place, that is, at the time the chloroform was given and she was rendered un-

(Testimony of Mrs. John Lappi.)

conscious in order to perform the operation?

A. The first operation was on the 25th of July, and I think the second was two weeks afterwards, or the first part of August, I am not sure how many days, or if it was two weeks afterwards, but it was something like that.

Q. Then she remained, I understood you to say, in the hospital four or five days and then you took her home? A. Yes, I took her home, then.

Q. And she was able at that time to walk down to the office all right? A. Oh, yes.

Q. From that on, what was the purpose of her going to Dr. Hall's office?

A. To get that neck dressed every day, and he used some kind of medicine.

Q. The wound was left open for drainage in there, so that it [130—84] could drain, and it was necessary to dress it every day? A. Yes.

Q. Do you know how many visits the child made to Dr. Hall's office?

A. I can't tell. It was between the 25th of July and the 24th day of September. During that time she was under his care.

Q. Part of that time you were not in town?

A. Yes, but only a few days. After the first operation I left her with Mrs. Nordale for about six days, I think. I don't remember that, even.

Q. During that period one of the little Nordales came to the office with her? A. Yes.

Q. Or at least was supposed to accompany her?

A. Yes.



(Testimony of Mrs. John Lappi.)

Q. Up until the time that you went out to Fairbanks Creek I understood you to say this morning that you went there every day with her?

A. I did. Yes.

Q. Every time she went there?

A. Every time she went there.

Q. Did you ever see Dr. Hall in the office, while he was dressing this wound, use chloroform to remove any bandages or adhesive tape? A. No.

Q. And saw how the child acted?

A. Only he said, "I am going to use the chloroform." He just talked that way in a joshing way to her. That is the way I understood it.

Q. You didn't see him use chloroform to remove the adhesive tape while you were there? [131—85]

A. No.

Q. He never did? A. No, not in his office.

Q. Don't misunderstand me that he administered chloroform to her as it is generally understood, but didn't you see him take, on occasions when it was necessary, and remove this tape which had stuck to the skin in order to hold the cotton and dressing there; haven't you seen him take a piece of cotton and dip it in the chloroform bottle and rub it, rub this rubber stuff off her neck?

A. I seen him, but I didn't know it was chloroform.

Q. What did she do on those occasions?

A. She cried. She said it hurt. The cut was very deep.

Q. What was it that hurt her, the cut, or did she say?

(Testimony of Mrs. John Lappi.)

A. When he would take that gauze off the cut.

Q. I am not referring to the gauze which was the dressing next to the wound, but you will remember that the child when the dressing was put on, probably the gauze next to the wound—(interrupted).

A. Yes.

Q. —with an antiseptic solution on it, then, in order to hold that on, a piece of adhesive tape, that is, a piece stuck to the skin was put across so as to hold that in place—(interrupted).      A. Yes.

Q. When that tape was removed, that was the time, the removal of the tape from the skin, is the time we are talking about the use of the chloroform?

A. I didn't know it was chloroform. He dipped the gauze into some kind of liquid. [132—86]

Q. What kind of a bottle was it?

A. I don't remember. It was just something white. I didn't inquire. I thought the doctor knew what he was doing.

Q. Whether you know what it was or not—whether it was chloroform or not—tell the jury how the child acted when she saw the bottle this liquid was in.

A. Whether it was chloroform?

Q. I mean when the doctor would remove this adhesive tape, what would she do if anything?

A. She always said, "It hurts," and she cried several times.

Q. Did you ever see her hold her nose and her mouth and hold her breath, and get red in the face? Did you ever see her do that?      A. I don't think so.

Q. Did you ever see her stiffen herself out as

(Testimony of Mrs. John Lappi.)

thought she was almost going into a convulsion, and throw herself back on the operating-table?

A. No.

Q. She would sit on the edge of the operating-table? A. Yes.

Q. And the doctor would be there working around her? A. Yes, and I was there myself.

Q. You never saw her act that way?

A. Sometimes she cried, and the doctor would say, "I am going to give you the chloroform," and she would say, "No, Doctor, don't," like that, as a child naturally would.

Q. Did you ever at those particular times see her hold her nose and hold her mouth and hold her breath? A. I don't remember.

Q. You would remember that if you had seen it?

A. Perhaps so, but I don't remember that.

Q. Did Mr. Lappi ever that you know of go with the girl to [133—87] the doctor's office when you were not there?

A. Yes. That was the day he paid Dr. Hall. He went there without me.

Q. And the child went with him? A. Yes.

Q. And the dressing of the neck occurred on that occasion, too?

A. Yes. but it was healed up so there was not much to be done.

Q. Did Mr. Lappi tell you or say anything to you upon his return on that occasion about the child holding her breath and acting in the way of going into convulsions and crying or screaming so that he had to shake her in order to make her stop?



(Testimony of Mrs. John Lappi.)

A. No, that was not necessary, because the cut was almost well. That was only a few days before I stopped her going there.

Q. Whether it was necessary or not I ask you if he ever said anything like that?

A. No, he never did. He told me he paid Dr. Hall sixty dollars, and he brought me the receipt.

Q. I understood you to say that the contract with Dr. Hall for performing this operation was one hundred dollars. A. Yes.

Q. Aren't you mistaken about that?

A. No, he said he would see the girl well for one hundred dollars. And when my husband paid him he said he expected a hundred and twenty-five dollars.

Q. Wasn't that the agreement in the first place?

A. Not with me.

Q. Did you make that contract with Dr. Hall yourself? [134—88]

A. Yes, I did. I asked him several times how much the charges were, and he said he would see the child well for that hundred dollars.

Q. Did you pretend to make the contract yourself or did Mr. Lappi?

A. I did, because Mr. Lappi went on Fairbanks Creek. That was made in the winter time first, and then when I came in the second time to have the child's neck operated on.

Q. That was made when you first went to Dr. Hall, the first time you saw him?

A. Yes, we were talking about it, but I don't re-

(Testimony of Mrs. John Lappi.)

member whether we made the contract then, the agreement, but the second time anyhow I asked him how much that operation would be.

Q. When was that second time?

A. That was last winter you know when we—(interrupted).

Q. Before you went to Fairbanks Creek?

A. Before I went to Fairbanks Creek. And when I came back and wanted to make the agreement then before the operation was done.

Q. Isn't this true: That when Dr. Hall was called to look at the child on Fairbanks Creek, that he criticised, you that is, told you that you should not have let it go that long; that it was in a very serious condition on account of the pus that had gathered in there and the infection? A. Yes, he told me that.

Q. Wasn't there an agreement just before the operation over there at St. Joseph's Hospital, that the price of the operation was to be one hundred and twenty-five dollars? [135—89]

A. No, sir. When I came from Fairbanks Creek I went to his office and wanted to know how much that would be and he said one hundred dollars.

Q. That was after he had seen the child on Fairbanks Creek?

A. There was no agreement on Fairbanks Creek.

Q. Wasn't the trouble with the doctor there that he said the child had been allowed to go so long that the glands were all festered and sore?

A. He said that, and he said, "The idea of your treating the child with Christian Science," and he

(Testimony of Mrs. John Lappi.)

didn't know whether I had ever treated her with Christian Science or not.

Q. Weren't you?     A. No, I wasn't.

Q. Had you ever told him you had?

A. No. I don't know where he got it.

Q. Were you present when the wound was first lanced?     A. I was.

Q. There was a large amount of pus came out, wasn't there?     A. Not such an awful lot.

Q. Wasn't there almost half a cupful?

A. No, sir, I don't think so. It was almost all blood that came out of it.

Q. A large amount?     A. Not very much.

Q. How much?

A. Just a little bit on the cotton there.

Q. Do you remember on how many occasions when you were at Dr. Hall's office with the little girl, it was necessary to remove these bandages by the use of chloroform?

A. Oh, not many times. Of course he had to use that kind of a sticky stuff over there first, but it was not many [136—90] times I should think, not many any way.

Q. Then after you came back from Fairbanks Creek were you present every time that the child was there with the exception of this last time that you speak of?

A. I was there until—it was a few days before that that I stepped on a nail and I couldn't go out of the house and I sent my little boy down with her.

Q. She was going to the office every day, was she?



(Testimony of Mrs. John Lappi.)

A. Not at that time. Every other day she was going towards the last.

Q. How many times altogether would you say that the child was at Dr. Hall's office when you were not present?

A. I don't think it was many times, because it was about a week that Arthur went down with her, then, if I can remember, it was about two times that she went there by herself when I couldn't get the little boy to go with her.

Q. During the time, as I understand you, that you were in town you went with her every day, except when the little boy went? A. Yes.

Q. And except this last time?

A. Yes. And the time my husband went with her once, which was the time he paid Dr. Hall.

Q. Outside of that you were there every day?

A. I was, except when she was stopping at Nordales, and then the little Nordale girl went with her.

Q. That was when you were on the creek?

A. Yes.

Q. Every time you were not on the creek, when you were in town, you went there every day, with the exception of [137—91] when Mr. Lappi went there and paid the bill, and with the exception of the time the little boy went?

A. Yes, sir. Every other time, with the exception of perhaps three times that she went there without either one of us.

Q. When were those three times, well toward the end?

(Testimony of Mrs. John Lappi.)

A. Yes, that was toward the last that she went there by herself. It was only necessary for her to stay a few minutes. She didn't even have the bandage around her neck, it was just the silk handkerchief.

Q. How was that silk handkerchief fastened on?

A. It was just tied on from the back like. She had it on the stand here.

Q. She had it on yesterday?

A. She had it on yesterday and she has it on this morning.

Q. Naturally, you being the mother of the child, think everything in the world of the child, and worship her almost, and have been very careful to watch over the child?

A. I have; all my time is for my children.

Q. And I understood you to say that, I think it was the time you related about the boy going down, or he was going down but he wanted to play and he didn't go down? A. He didn't go down.

Q. At the same time you were suspicious on account of rumors, that is, your mind was in that state that you were suspicious about something.

A. My mind was in a state of suspicion all summer, but being that Mrs. Hall was doing the office work herself, and that she was there every day, I thought that between the man and the wife, the child ought to be safe.

The COURT.—Regarding the matter of suspicions that she testified to on direct examination, the Court excluded [138—92] that.

(Testimony of Mrs. John Lappi.)

Mr. STEVENS.—I made no objection to that. That is in the record.

The COURT.—She was answering something that had not been asked her, and the Court stopped her from answering.

Mr. MARQUAM.—I see.

Q. At any rate, your mind was in that condition, but—

A. My mind was in that condition, and—

Q. Never mind, you have answered.

A. I overheard some gossip—

Q. Never mind what it was over. You were nervous and uneasy, I suppose?

A. Not then, no, because— (interrupted).

Q. When did you commence to get nervous?

A. After he done the dirty trick, but not before. I thought Dr. Hall was a gentleman, being that he was a father, having children, and having a young, little wife of his own.

Q. Didn't I understand you to say a moment ago that you were in that frame of mind all summer by reason of gossip?

A. I had reason to believe it, yes. I had reason to have that in my mind.

Q. That is what I am getting at? A. Yes.

Q. Now, along about the last of September, your mind was in this condition? A. No.

Q. And you were looking—you were suspicious and you were looking for something?

A. I wasn't looking for something, no.

Q. Now, listen a moment. Whether you were



(Testimony of Mrs. John Lappi.)

actually looking for it, the way you understand my question, you were in a [139—93] condition of mind to believe a thing much quicker than you would ordinarily have believed it; isn't that true?

A. No, I wasn't believing it, I told you. I told Dr. Hall in his office that I thought he was a gentleman. I didn't believe it, and being that she was there, I thought between man and wife the child ought to be safe. I heard this gossip, but I don't believe that always.

Q. Then you didn't pay any attention to that gossip?

A. I didn't pay any attention to that.

Q. And you never did pay any attention to that gossip until afterwards?

A. Until afterwards. I believe all the gossip now.

Q. Never mind about what you believe now or don't believe. Undoubtedly that is what you are trying to tell this jury.

A. No, I am telling my own experience.

Q. If you are, just do that?      A. Yes.

Q. Then we will get along very nicely?

A. Just my own experience. Every mother can find for their own selves and can fight their own battles, and I will fight my own, and it is only the truth with me, and you are a man of honor, are you not—

The COURT.—Mrs. Lappi, just answer the questions which Mr. Marquam asks you and keep composed when answering the questions.

(Testimony of Mrs. John Lappi.)

The WITNESS.—Your Honor, I will try to.

(Mr. MARQUAM.)

Q. I understood you to say, this morning, Mrs. Lappi, in answer to Mr. Roth's questions, that at the time the little child went down on the 24th day of September that you didn't want her to go because of the suspicions and [140—94] the fear that you had?

A. I didn't want her to go alone? I wanted my boy to go.

Q. You so testified.      A. I did, yes.

Q. Didn't you mean when you said that, that at this particular time, on this particular day, which you say was on the 24th day of September, that you were suspicious apparently of Dr. Hall, and you didn't want the child to go down there by reason of that suspicion?

A. Not that day, I didn't think about that, but I didn't like the idea of her going alone any way.

Q. Didn't you say this morning in your testimony that you didn't want her to go there without somebody being with her, but that you couldn't go on account of your foot?      A. Yes, sir.

Q. And you didn't want her to go alone there on account of the suspicion you already had by reason of reports and rumors. Didn't you say that?

A. Yes. But I didn't say that particular day that I was suspicious, being that Mrs. Hall was there.

Q. Now, you say that as soon as this little child got into the house, or opened the door and came running to you, and said "Oh, mamma, dear, I don't

(Testimony of Mrs. John Lappi.)

want to go down there any more”?

A. No, I opened the door, and she said, “My darling mamma, I am not going down again.”

Q. She first spoke to you.

A. She spoke first to me.

Q. You are sure of that?

A. I said, “You have been running.” She said, “Yes.” She said [141—95] like that (indicating heavy breathing) as she came in. I said, “You have been running.” She said, “My darling mamma, I am not going down again.”

Q. That is just what occurred when she got into the house? A. That is the words.

Q. What else did she say, and what did she do?

A. I said, “Why, love, how is that?” She said, “He was feeling me, how fat I was getting.” I said, “Where?” and she told me, which she has told all you gentlemen here.

Q. That was said immediately after she came into the house? A. The very words.

Q. Without any questioning upon your part?

A. No. Her little rain cape wasn’t off, and the door was hardly shut, Mr. Marquam.

Q. And this was—I p̄sume three or four minutes after she got into the house you knew all about it?

A. I didn’t have the heart to question everything. She didn’t tell me everything that same day.

Q. You didn’t question her then at all?

A. Not a bit.

Q. When did you question her?

A. I didn’t question her at all, not that time, be-



(Testimony of Mrs. John Lappi.)

cause I was—you know how a mother feels when she hears anything like that.

The COURT.—Just a moment. He asked you the question: When did you question her?

A. I didn't question her until Mr. Roth questioned her next.

Q. You never questioned her at all?

A. Not at all.

Q. When was that? [142—96]

A. This was after Christmas some time when Mr. Roth came to my house with Mr. Clark, the Chief Deputy Marshal and they—(interrupted).

Q. Up to that time you had never questioned her?

A. I never had mentioned one word to her, because a mother can't do that.

Q. And everything that she told you, was told voluntarily by her? A. It was.

Q. You know Mrs. Hall, don't you? A. I do.

Q. Did you ever write Mrs. Hall a note about this matter? A. I did.

Q. When?

A. The very day I went to Dr. Hall's office, but I didn't get to send that until the next day, when I sent Mr. Howie with the message—Mr. Howie the messenger.

Q. What was contained in that letter?

A. It was: "Mrs. Hall: Please keep your husband at home or stay in the office with him, so he will leave these poor innocent children alone. You know what this means. Most respectfully. Mrs. Lappi."

(Testimony of Mrs. John Lappi.)

Q. You didn't keep a copy of it?

A. I didn't, but these are the very exact words.

Q. You have repeated it, word for word?

A. Every word.

Q. What did Mrs. Hall do in response to that letter?

A. She came up to my house about five minutes after I got there. I waited at the messenger office until Mr. Howie got back.

Q. How long was it between the time that you gave the letter [143—97] to the messenger until Mrs. Hall came to your place?

A. I stayed at the messenger office until Mr. Howie came back and then I came up home, and about five minutes afterwards Mrs. Hall came up crying, and she asked me, "Mrs. Lappi, did you write this?" I said, "Mrs. Hall, I did." "I didn't mean to hurt your feelings. You have done me no harm, and nobody else has but your husband, but I have got to tell you what kind of a beast you are living with." And she said, "Mrs. Lappi, you have done a mother's duty."

Q. What else was said there?

A. And she wanted to know what he had done.

Q. And what did you tell her?

A. I told her. First I said, "I don't want to tell you, but you know as much what I wrote to you, and you know what it means." And she was begging me to tell her and finally I told her.

Q. What did you tell her?

A. I told her that Dr. Hall had opened—had took

(Testimony of Mrs. John Lappi.)

my girl on his lap and kissed her little bottom. I didn't know. The child tells now that it was above her knee that he kissed her. She said, "Oh, my God, and the man that I loved!" I said, "Girl, how could you love a beast?" Isn't that so, Mr. Marquam?

Q. You are answering the questions, Mrs. Lappi.

A. Excuse me.

Mr. MARQUAM.—Just try and answer the questions. I appreciate your feelings.

The COURT.—Yes, just answer the questions that Mr. Marquam asks you. [144—98]

The WITNESS.—I will try to. (Weeps.)

(Mr. MARQUAM.)

Q. Is that all the conversation that occurred between you and Mrs. Hall.

A. She stood there quite awhile and cried and cried and cried.

Q. Just about the conversation, what words were used?

A. We were talking on the same thing, over and over, the same thing all the time.

Q. What you have told is just what was said and nothing more? A. Yes.

Q. I will ask you if it is not a fact that when Mrs. Hall came there and saw you that you wouldn't tell her anything about it until she insisted upon knowing A. Yes.

Q. And then that you said to her—(interrupted).

A. Yes, she insisted.

Q. Listen. Then you said to Mrs. Hall that the



(Testimony of Mrs. John Lappi.)

child came home and her face was very red—(interrupted).     A. Very red and very excited.

Q. Just a minute. That you asked the child what was the matter and the child told you that nothing was the matter. Didn't you tell Mrs. Hall that?

A. I never did.

Q. Didn't you further tell Mrs. Hall at that time that you never found out, and she hadn't told you, that there was anything the matter, but that afterwards you found out. Isn't that true?

A. No, sir, that is not true. Mrs. Hall don't say that.

Q. That is all. You say it is not true? [145—99]

A. No, it is not.

Q. Did you ever see or talk with Mrs. Hall again?

A. I spoke to her at the St. Matthews fair and I saw her on the streets, but I turned my head away. I thought she is no woman, no woman with honor. (Mr. MARQUAM.)

Q. And because you thought she was no woman of honor you would not speak to her?     A. No.

Q. That was the reason?

A. That was the reason.

Q. And you deny, now that I have called your attention to it, deny unequivocally, that that is what you told Mrs. Hall at the time she came to you?

A. I deny that, yes.

Q. If you found out later about this matter from this child why didn't you go down to Dr. Hall's office the same day?

A. How could I? I was almost in hysterics, and

(Testimony of Mrs. John Lappi.)

I was alone, my husband had gone down to Ruby.

Q. Your husband hadn't got back by Monday or Tuesday?

A. No, but I got my mind back, and I thought, now this is the time for me to go, and when I went down and came back Mrs. Hall came there and She begged me to save her name.

Q. What did Mrs. Hall tell you in that respect?

A. She said, "Mrs. Lappi, please save my name." She said she believed the child was telling the truth, but she said, "Please save my name." She said that about a dozen times.

Q. Mrs. Dr. Hall told you that?

A. Mrs. Dr. Hall, yes.

Q. Was there anybody else that heard this talk?

A. Only my children in the cabin. They were there waiting [146—100] for their lunch. It was at noon.

Q. Since the child was on the stand this morning, and after a recess was taken for five minutes at counsel's suggestion, and you went into the district attorney's office, did you talk with the child in there?

A. No.

Q. Was she in the same room with you?

A. Yes, sir, and lots of others, and we never mentioned a word about it.

Q. Was Mr. Roth in there with you?      A. No.

Q. Were any of the assistant district attorneys in there with you?

A. No. Only just when I was leaving, I talked

(Testimony of Mrs. John Lappi.)

with Mr. Roth a few moments.

Q. Did you know what the child had said on the stand here?     A. I did not.

Q. Did she tell you when you went out to your house?     A. No, sir; not one word.

Q. Did you talk with the child during the noon hour about what she testified on the stand, or did you not?     A. I did not.

Q. How did you happen to mention here in your testimony about the girl, after having said to you that Doctor Hall had opened her panties and kissed her little bottom—how did you happen to tell that?

A. I don't understand the question.

Q. You testified here in answer to a direct question by Mr. Roth that the child did tell you at one time, that Dr. Hall had opened her little panties and kissed her little bottom?     [147—101]

A. She told me that first, and then when Mr. Roth came out to my house, he told me to bring the child down to his office, and I did, and he questioned her, and there was never a word mentioned at all *that had been down* to the Grand Jury. Then I asked her about this. That was the only second time that I asked any questions and never since.

Q. That is the time that she told a different story about it?

A. Not a different, but she told me more about it.

Q. She didn't tell you anything different?

A. Nothing different, only more and more.

Q. She did keep telling you that Dr. Hall had opened her little panties and kissed her on her little



(Testimony of Mrs. John Lappi.)

bottom? A. No, she said he kissed her knee.

Q. Then she told a different story?

A. No, she didn't tell me that story at the house. It was my mistake.

Q. How could it be your mistake? If she told you you understood what she said.

A. She said he kissed her, and I didn't ask her where he kissed her.

Q. Then she never told you that?

A. No. She said he kissed her above her knee.

Q. She never told you then that Dr. Hall had opened her pants and kissed her little bottom?

A. No, she never told me that. She said he kissed her "down there." She didn't say where and I didn't have the heart to question her.

Q. She never as a matter of fact, at any time, ever told you that Dr. Hall had opened her pants and kissed her little bottom? [148—102]

A. No, she never has.

Q. So if the child says that she told you that, she is mistaken about that?

A. Yes, she didn't tell me that, no.

Q. Was that the only reason that you didn't go immediately to Dr. Hall's office that Thursday?

A. Isn't that enough?

Q. (Continuing.) On account of your mental condition?

The COURT.—Is that the only reason is the question.

A. That was the only reason, Mr. Marquam.

(Mr. MARQUAM.)

Q. It was not by reason of the fact that you had

(Testimony of Mrs. John Lappi.)

run a nail in your foot and you were lame?

A. I wasn't lame at that time.

Q. You had recovered from that?

A. I had recovered. I could wear a shoe then at that time.

Q. You said a moment ago that by Monday, I think it was, you had regained your mind. What do you mean by that? Were you in the meantime, in such a hysterical, unsettled condition mentally that you didn't know what you were doing?

A. Yes. If I went then, I would have taken a gun with me and killed him, as other mothers should have done away before that.

Q. Just tell what you know. You are going too far.

A. Excuse me, I may be. But I am a mother, and you have got to excuse me.

Q. I understand the condition and situation thoroughly. Well, there was no danger to you in writing to Mrs. Hall as you did, there was no danger of you putting a gun on her. Why didn't you write to her before Tuesday? [149—103] A. No.

Q. (Continuing.) If you knew all about this by Monday. A. Monday?

Q. I mean by Tuesday?

A. Well, because I wasn't talking to no one about it. And after I had told him, and when I saw him shiver there, and feel how guilty he was, I thought, now is the time for that little woman to know what kind of a beast she is living with.

Q. That is the reason?

(Testimony of Mrs. John Lappi.)

A. That is the reason. And I wrote the letter Monday afternoon, but the messenger couldn't find Mrs. Hall, so I took the letter with me and I went down Tuesday noon about eleven o'clock.

Q. Who had you talked with in the meantime? From the time that the child came home and told you until you went down to Dr. Hall's office?

A. No one. Not a soul, until after I went to Dr. Hall's office, and I talked to Mr. and Mrs. Nordale both the very Monday that I went down to Dr. Hall's.

Q. You never talked to a soul in the meantime?

A. Not a soul.

Q. No one?

A. No one. I thought it was a disgrace to talk to any one about such a thing.

Q. You never talked to the child, never asked her any questions?

A. Never asked until Mr. Roth come to my office—excuse me—to my house, with Mr. Clark.

Q. Did he talk with the child at that time?

A. No, she was in school, but I took her down to Roth's [150—104] office the next day.

Q. So then Mr. Roth never talked to the child at your house? A. No.

Q. He didn't?

A. He did just this last winter and the child told him the very words she has told here in this office.

Q. That was at your house?

A. Yes, that was at my house.

Q. What time was it, as a matter of fact, that Mr.



(Testimony of Mrs. John Lappi.)

Roth was first at your house?

A. Well, it was this winter some time. That must have been over two months ago, more than that, more than two months ago.

Q. Didn't he come there voluntarily, or had you ever talked to him before?

A. I never saw the man. Well, I knew who he was, but I had never spoken to him in my life.

Q. When you went down to Dr. Hall's office, you described to the jury how white and shaken he was?

A. Yes.

Q. And you said this morning that when you were talking with the Doctor, you were talking very loud?

A. Very loud.

Q. And you told him you didn't care who heard about it?

A. No, I didn't, because—(interrupted).

Q. Didn't he say at that time, "Now here, if you are going to talk this way, I want somebody here to to hear your testimony or hear you talk?"

A. Yes.

Q. And didn't he then say to go over and send for Mr. Crossley? A. Yes. [151—105]

Q. You knew who Mr. Crossley was, that he was the District Attorney? A. Yes.

Q. And you knew who he was at that time?

A. Yes.

Q. Or if you didn't want to do that, that he would go over to Mr. Crossley's office with you?

A. No, he didn't say that.

Q. What did he say about Crossley?

(Testimony of Mrs. John Lappi.)

A. He said he wanted witnesses. He opened the door but we stood in the hallway, and I kept on talking, and I said: "Old man, you would not be president of these lodges very long, if I can help it." I think I mentioned the Pioneers too. And he shivered, and didn't answer me.

Q. Show the Jury what he did when he shivered?

A. He did like that (indicating). And never an answer from him. And he went in his office, and I kept on talking, and not an answer from him.

Q. Describe what you mean by him shivering?

A. I can't tell you. You know what I mean.

Q. I don't know what you mean?

A. Yes, you do.

Q. Show the jury what you mean?

A. When I see a man white and pale and he shivers, isn't that enough explanation?

Q. Tell the jury what you mean by shivering?

A. When I pointed my finger at him and said that he would not be president of these lodges very long if I could help it, he was white, and he shivered like this (indicating).

Q. Shaky and white?

A. Shaky, yes. I could see him shake, and he went into his room. [152—106]

Q. What part of him was shaking?

A. Well, all over him. That is a funny question.

Mr. ROTH.—Just answer the questions.

(Mr. MARQUAM.)

Q. How did he shake, or how long did he shiver?

A. Just a moment, because he went in his office.

(Testimony of Mrs. John Lappi.)

Q. And were you standing up at that time?

A. I was standing up there in the hallway, and I kept on talking, and I threatened to kill him if he ever laid his hands on my child.

Q. Were you threatening then to kill him?

A. No, not then, but I said, "If you ever lay your hand on my child again or ever speak to her."

Q. Was he shivering from the fear that you would then shoot him?     A. He went in the other room.

Q. He was shivering in the other room?

A. I didn't see it. I didn't look at him then.

Q. Where was he shivering in the other room?

A. In the hallway.

Q. What did you mean by the hallway?

A. When you come up those steps, just right above those steps we were standing there.

Q. And you had almost concluded your conversation?     A. Almost, yes.

Q. He didn't shiver before that?

A. No, he came to me and said "Sh, Mrs. Lappi, not so loud."

Q. Where was this, in the hall?

A. No, in the sitting-room. I was sitting in the rocking-chair.

Q. What was the first word that you said to him or that he said when you came in. [153—107]

A. He said, "Good morning," and I didn't answer.

Q. Did he say it just that way?

A. Yes; "Good morning," he says, you know just the way he has.



(Testimony of Mrs. John Lappi.)

Q. I don't know. I'm asking you about it.

A. And I didn't answer, and he said, "It is a lovely morning," or something like that, and I didn't answer.

Q. Did he shiver at that time?

A. No but he was white.

Q. Do you mean he was pale?

A. Pale, yes. He didn't open the door as he used to do.

Q. How did he used to do it?

A. He would open it, "Why good morning," if anybody was there, he came in this morning scared.

Q. He was scared before he got in there?

A. I don't know.

Q. Did he get scared after he saw you?

A. He had reason to get scared.

The COURT.—I will ask you to conclude that kind of cross-examination as speedily as you can.

Mr. MARQUAM.—By reason of the fact that it is not proper?

The COURT.—Yes. It does not seem to me entirely proper. It is argumentative in the first place.

Mr. MARQUAM.—We except to the remarks of the Court in the presence of the jury upon the question of improper cross-examination.

The COURT.—Exception allowed.

Mr. MARQUAM.—Q. Now Mrs. Lappi, after he came in, did he remain in the room that you was seated in?

A. Yes, he did. He walked away just close to the

(Testimony of Mrs. John Lappi.)

hall. He didn't come in like he used to do. [154—108]

Q. Did he go into the other room, into the room next to the reception-room?

A. The door was open and I think he put his satchel down. He had a little satchel in his hand, and he said another word to me, but I don't remember what it was, and I didn't answer him, I just looked at him, and I said, "What do you mean?"

Q. What did he say to that?

A. He said, "What do I mean?" I said, "Yes, when you tackle an innocent child."

Q. Then what did he say?

Q. "Tackle an innocent child?" he said. I said, "Yes," and I told him then what she said.

Q. What did you tell him?

A. I told him that he took her on his lap and opened her clothes and was feeling her and kissed her little bottom, I said.

Q. And was feeling her?

A. And was feeling her. And he said, "She lies," and I said, "My child don't lie," and I was sitting in the rocking-chair there.

Q. Then what else was said?

A. He said "Mrs. Lappi, not so loud."

Q. Then what else was said?

A. I told him I wasn't afraid. He said, "She lies. I was only feeling her over here (showing.) I wasn't feeling her down there (showing)." That is what he said to me.

Q. Then what else did you say?

(Testimony of Mrs. John Lappi.)

A. I said that my child don't lie, and I said, "You know she don't lie." And he said, "I won't stand for such talk, [155—109] you get witnesses or go to Mr. Crossley." I said, "Yes, I'm not through with you now." Then he opened the door as we went into the hallway and stood there, and there was two men went up the steps and went into Dr. Trabue's office.

Q. Who were they? A. I don't know.

Q. Did you ever see them since?

A. I never saw them since, or I don't remember who they were. I didn't know who they were.

Q. Was there anybody else round there that you saw? A. No, I didn't see no one else around.

Q. What tone of voice were you using during this talk? A. The same as I am doing right now.

Q. Were not you shouting?

A. No, just the same as now. I cried more here now than I did then. My words were very exactly what they are now. And my tone is exactly the same, only I cried here, but I didn't there.

Q. You didn't cry any there?

A. Not a bit. Because I was mad enough to kill him.

Q. It was anger—(interrupted).

A. And the truth coming from a mother.

Q. It was anger was it?

A. It was anger and the truth from a mother. Every mother's duty is that.

Q. And you were talking very loud?

A. Very loud and—



(Testimony of Mrs. John Lappi.)

Q. And saying—and you told Dr. Hall that you didn't care who heard it? [156—110]

A. Who heard it.

Q. And you were trying to make everybody in the house hear what you called him?

A. They may have heard it. I don't know whether they did.

Q. Do you know whether they heard it? Do you know anybody that heard it?

A. I have no idea.

Q. At the time that you told Dr. Hall something about his not being president of the Pioneers any more, what else did you say to him?

A. I pointed my finger at him, and I said: "You tackle big people; don't tackle a child, and if you ever tackle my child again or speak to her, I'm going to shoot you dead."

Q. What else did you say? What was said about your not paying him anything?

A. Not a word. That was not the question. My husband—

Q. Never mind about that. My question was: What did you say, if anything, about not paying him any more money?

A. I never mentioned a word.

Q. Didn't you say to him at that time, either in the room or in the hall, "I am not going to pay you another cent of money."

A. There was not money mentioned, because I pay my bills that I am to pay.

Q. You never said a word about it?

(Testimony of Mrs. John Lappi.)

A. Not a word.

Q. Was any matter of that kind said or mentioned in your conversation with Mrs. Hall?

A. I said—(interrupted).

The COURT.—Take your time in answering questions and don't speak too loud. [157—111]

A. I will try to. I said: "That is what you get by being so nice. Every little money we have I sent my husband down to pay him." And I would have to pay him the rest as soon as he was through with the child. I said that to Mrs. Hall. She didn't answer. She cried.

Q. Didn't you say to Mrs. Hall at the time she and you were talking up at your house that you were never going to pay the doctor another cent, or words to that effect?

A. No, because a doctor deserves his pay.

Q. Pardon me for stopping you, but just answer the questions that are asked you. A. Yes.

Mr. MARQUAM.—You may examine her.

Redirect Examination.

(By Mr. ROTH.)

Q. Mr. Marquam asked you how many times you saw Dr. Hall use chloroform to remove any of the adhesive cloths that were fastened to the neck of the child, and you said you didn't know how many times.

A. I didn't.

Q. Do you know that he used chloroform at all for that purpose?

A. I did not. I told Mr. Marquam it was something in a bottle, but I didn't know whether it was water

(Testimony of Mrs. John Lappi.)

or not. It was white. It looked as clear as water.

Q. Do you remember what the chloroform smelled like at the operation? A. Yes.

Q. Did you ever smell anything that smelled like the chloroform when he was dressing the child over here? [158—112]

A. No, I didn't. I wasn't in the operating room when the child was operated on, because her father was there when she took the chloroform. I stayed in the other room.

Q. And you don't know whether it was chloroform that he used in moistening the adhesive plaster that held the dressings or not? A. No, I do not.

Q. You don't know what kind of a liquid it was?

A. No, it was white. As pure as water.

(The COURT.)

Q. Do you mean colorless or white?

A. Colorless.

Q. Did it look like water?

A. Just exactly like water.

Q. It looked like water rather than like milk?

A. Yes.

Mr. ROTH.—That is all.

Mr. MARQUAM.—That is all.

(The Court continues the trial until 10 A. M. Tuesday, April 20th, 1915, and the jury retire in charge of the bailiffs, after being admonished as usual by the Court.)

Tuesday, April 20th, 1915, 10 A. M.

Defendant and jury present.

(Pending an argument by the attorneys, the jury is



(Testimony of Mrs. John Lappi.)

again ordered to withdraw from the courtroom and retire in charge of the bailiffs. At 12 M. the defendant and the jury are present, and the Court takes a recess until 2 P. M., at which time, the jury are again placed in charge of the bailiffs and withdraw from the courtroom, and at 4:30 P. M., the jury return into court, and the defendant being present, the trial is resumed.) [159—113]

**[Testimony of Charlotte Geis, for Plaintiff.]**

CHARLOTTE GEIS, a witness on behalf of plaintiff, after being duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. ROTH.)

Q. What is your name?

The COURT.—I would like to have you interrogate the witness what she understands by an oath, and whether she knows what she is here for.

Mr. ROTH.—I will come to that in a moment.

Q. What is your name? A. Charlotte Geis.

Q. How old are you? A. Nine years old.

Q. When will you be ten?

A. On the 18th of June.

Q. Do you know where you were born?

A. Yes, right here.

Q. In Fairbanks? A. Yes.

Q. Do you know what it means to take an oath to tell the truth? A. Yes.

Q. What might happen if you didn't tell the truth after you took the oath? What might they do to you? A. Be punished.

(Testimony of Charlotte Geis.)

Q. Do you know in what way you might be punished? A. (Nods head in the negative.)

Q. Do you go to Sunday School? A. Yes.

Q. Do you understand that a person that would tell an [160—114] untruth after he takes an oath to tell the truth might go to jail? A. Yes.

Q. Do you realize that a person might go to jail if he swore falsely?

The COURT.—(To Witness.) Instead of shaking your head say yes or no.

A. Yes.

Mr. MARQUAM.—That is not the character of questions to put to this witness. If this child should tell an untruth we couldn't punish her for perjury.

(Mr. ROTH.)

Q. Do you go to Sunday School?

A. Yes.

Q. And do you go to school? A. Yes.

Q. Where do you go to school?

A. Up at school.

Q. What grade are you in? A. Third grade.

Q. Who is your teacher? A. Miss Karrer.

Q. What is your father's name?

A. Robert Geis.

Q. Have you any brothers? A. Yes.

Q. What are your brothers' names?

A. Charles.

Q. Have you only one brother? A. Yes.

Q. Have you any sisters? [161—115]

A. Yes.

Q. How many? A. Two.

(Testimony of Charlotte Geis.)

Q. Are they older than you or younger than you?

A. Younger.

Q. Is Charlie older or younger than you?

A. Older.

Q. How old is Charles?      A. He is eleven.

Q. Do you know Mr. Hall?      A. Yes.

Q. Did you ever go to Dr. Hall's office?

A. Yes.

Q. How many times did you ever go to Dr. Hall's office, Charlotte?      A. I don't remember.

Q. Do you remember the last time you went to Dr. Hall's office?

(Defendant objects as assuming that she went to the office more than once. Objection sustained.)

Q. Have you been to Dr. Hall's office more than once?      A. Yes.

Q. Do you remember the last time that you went to Dr. Hall's office?      A. Yes.

Q. Who went with you?

A. My brother Charles.

Q. Do you remember when it was that you went there?      A. Yes, it was in August.

Q. Now, with reference to the time that your baby sister was born, when was it that you went there the last time? [162—116]

A. It was Friday before the excursion.

Q. When was your baby sister born?

A. Sunday.

Q. The next Sunday?      A. Yes.

Q. How old is your baby sister?

A. She will be three on the 18th of August.



(Testimony of Charlotte Geis.)

Q. How did you happen to go to Dr. Hall's office that time, Charlotte?

A. I went—(cries)—I went with my brother when he had a cut.

Q. Where was your brother cut, Charlotte?

A. (No answer, witness crying.)

Mr. STEVENS.—The defendant objects to the question and the testimony of this witness, first, for the reason that the witness has not shown herself to be competent to appreciate the obligation of an oath; second, that the testimony is immaterial, irrelevant, incompetent, and impertinent for any purpose, as it does not appear that Selma Lappi was present at the time or any other person except Dr. Hall and the brother Charles; the time is not definitely fixed, and there can be no object in the testimony to be conceived by the defendant at this time, excepting an attempt on the part of the prosecution to prejudice the minds of the jury by offering some testimony that is wholly improper. I can only anticipate the object at this time. Certainly the question he asks, whether preliminary or not, is subject to the objections that I have just made.

(The objection was overruled by the Court, and the defendant reserves an exception, which exception is allowed.) [163—117]

Q. What was the matter with Charlie at that time?

A. He had a cut in the forehead.

Q. Did you leave Dr. Hall's office when Charles left? A. No.

Q. How did you come to not leave?

Mr. STEVENS.—We object for the reasons made

(Testimony of Charlotte Geis.)

to the question last objected to, and for the further reason that no testimony of the nature sought to be given by this witness is competent, for the reason that any conduct, whether proper conduct or improper conduct, upon the part of Dr. Hall towards this child, is wholly inadmissible under the laws, being a different person from that alleged in the indictment; for the further reason that the testimony is too remote, and there has been no showing upon the part of the Government that it is connected directly or indirectly with the offense charged in the indictment.

The COURT.—What is the purpose of the testimony, Mr. Roth?

Mr. ROTH.—The purpose of the testimony—(interrupted).

Mr. MARQUAM.—We object unless it appears to the Court that it is clearly admissible, we object to counsel stating the purpose of it in the presence of the jury, for the damage is done if counsel makes the statement.

The COURT.—Objection overruled. (Defendant saves an exception, which exception is allowed.)

(Mr. ROTH.)

Q. How did you come to not leave Dr. Hall's office when Charles left?

A. I was sitting in his lap, in Dr. Hall's lap—(interrupted.) [164—118]

Mr. STEVENS.—We desire to be understood that our same objections go to all this testimony.

The COURT.—For the reasons heretofore assigned?

(Testimony of Charlotte Geis.)

Mr. STEVENS.—Yes. And we desire an exception to the ruling of the Court allowing it to go in.

Mr. ROTH.—For the purpose of obviating the necessity of interrupting the witness, the prosecution is willing to stipulate that the objections heretofore made to the questions is made to all of the testimony to be given by this witness, and that an exception is taken and an exception allowed.

The COURT.—Very well.

(Mr. ROTH.)

Q. You just stated that you were sitting in Dr. Hall's lap. What did Dr. Hall say?

A. When my brother went, he said, "Sister, are you coming?"

Q. Yes, all right.

A. And the doctor said, "No, she is going to stay here a little while."

Q. All right, then, did your brother go away?

A. Yes.

Q. Was the office door open or was it shut, after your— A. I think it was shut.

Q. What kind of underclothes did you have on?

A. I didn't have any on.

Q. What kind of clothes were you wearing at that time? A. Bloomers.

Q. How were the bloomers fastened around the legs here (indicating)?

A. With elastic. [165—119]

Q. What did Dr. Hall do after your brother left?

A. Put his hand up under my bloomers.

Q. Where did he put his hand, Charlotte? Did he put it up here (indicating)? A. Yes.



(Testimony of Charlotte Geis.)

Mr. MARQUAM.—We object to that and wish the record to show that at the time counsel is asking the question he is going through motions with his hands and indicating and—(interrupted).

The COURT.—Objection sustained.

Mr. MARQUAM.—We ask that counsel be warned not to repeat a performance of that kind.

The COURT.—Of course, Mr. Roth, you will not illustrate what the child may testify to. You should be governed entirely by what the answer of the child is.

Mr. ROTH.—It is extremely difficult to require a child to mention names. That was why I put the question the way I did.

Mr. STEVENS.—And that was wholly improper.  
(Mr. ROTH.)

Q. Where did Dr. Hall put his hand when he put it up under your bloomers? A. He put it on—

Q. Tell us where he put his hand.

A. Put it right down here (indicating).

Q. Did he do anything with his finger?

A. Yes. (Cries.)

Q. Where did he put his finger?

A. Right here (indicating)—(Cries).

Q. Did he put it inside? A. Yes. [166—120]

Q. Charlotte, let me ask you this question: What did he do with his finger after he put it inside?

A. Around like this (showing).

Q. Did he say anything to you? A. No.

Q. After that what did you do, Charlotte?

A. Nothing.

Q. How long did you stay there?

(Testimony of Charlotte Geis.)

A. Not very long.

Q. Did Dr. Hall say anything to you at all?

A. I don't remember of him ever saying a thing?

Q. Was Dr. Hall treating you at that time for anything?     A. Yes, I had—no.

Q. Had he treated you before?

A. Not for any other thing, but one time I had a sty on my eye and he fixed that.

Q. How long before?

A. I don't remember.

Q. But at this time that you went there with Charles, was Dr. Hall treating you at that time?

A. No.

Mr. ROTH.—You may cross-examine.

(Counsel for defendant ask that the trial be continued until 10 o'clock to-morrow morning but the Court takes a recess for fifteen minutes, and after the recess, the jury and the defendant being present, trial is resumed, the witness Charlotte Geis being on the witness-stand).

#### Cross-examination.

By Mr. MARQUAM.—At this time we move that all the testimony of the witness Charlotte Geis be stricken for the reason that the same is irrelevant, incompetent and immaterial, and neither tending to prove or disprove any element of [167—121] the offense charged, and is not shown to have happened within such time as could throw any light upon any element of the offense charged, and is in no way connected with this case.

(The motion is denied. Defendant saves an exception, which exception is allowed.)

(Testimony of Charlotte Geis.)

Q. You say you are ten years old?

A. No, nine.

Q. How old were you at this time that you were at Dr. Hall's office?      A. Seven years old.

Q. How do you remember that?

A. Because it was two years ago, and it will be three years ago in August.

Q. How do you remember it was August?

A. Because my sister was born on Sunday and I went to the excursion on Saturday, and this happened on Friday.

Q. How do you know it was August?

A. Because sister was born in August.

Q. Do you remember that yourself?      A. Yes.

Q. Or did somebody tell you that?

A. I remember that she was born in August.

Q. Isn't it true that the fact that you say it was August is due to what your mother or your father or somebody said about when her birthday is, or was?

A. Well, I know it was the 18th of August.

Q. What is?      A. Sister's birthday.

Q. She was born on the 18th of August, of what year?      A. 1913. [168—122]

Q. When was this with reference to that time?

A. In August.

Q. Was it before or after your sister was born?

A. It was before.

Q. How long before?

A. My sister was born on Sunday and mother went to the hospital Saturday evening.

Q. What day was this that you went there?

A. Friday.



(Testimony of Charlotte Geis.)

Q. You say you had been up there before at Dr. Hall's office?      A. Yes.

Q. Before this time you had been up to Dr. Hall's office?      A. Yes.

Q. How often?

A. I don't remember. I think two or three times. I think two times, though, but I don't remember. It was two or three times.

Q. How long before?

A. I don't remember how long before it was.

Q. Do you mean just a short time or a long time before?      A. I can't tell.

Q. Was it a year before, or six months—what were you up there for when you were there before?

A. I had a sty taken off my eye.

Q. Do you remember how old you were then?

A. No.

Q. You don't remember when it was?

A. No.

Q. Who went up with you to Dr. Hall's office then?

A. My father. [169—123]

Q. And the sty was taken off, was it?      A. Yes.

Q. What were you doing in the office on this occasion?

A. I went up with my brother Charles.

Q. What was he going up there for?

A. He had a cut in his forehead.

Q. How did he cut it?

A. He got hit with a baseball bat.

Q. He was playing baseball, was he?      A. Yes.

Q. Were you with him when it happened?

A. No.

(Testimony of Charlotte Geis.)

Q. Did you leave your home to go up there to Dr. Hall's office?      A. Yes.

Q. Did Charlie come home with his head cut?

A. No, this was after. He had his head cut, then he went up to Dr. Hall's to have it fixed and I went with him.

Q. Did you leave home together?

A. Yes.

Q. Was it in the evening, after dinner?

A. Yes, after dinner.

Q. It was light when you went down there?

A. Yes.

Q. Just go ahead and tell me, Charlotte, just what happened when you were down there, and everything that happened. What you did, what Charlie did, and what Dr. Hall did.

A. We went down to get this cut fixed, and I was sitting on Dr. Hall's lap—(cries).

Q. Don't cry, Charlotte, just tell us what happened? [170—124]

A. Witness continues crying.

Q. Don't cry, but just tell us like you did when Mr. Roth was questioning you. All I want to know is everything that happened. Just tell us everything that happened.

A. My brother, when he was going, he asked me if I was going, and Doctor Hall said, "No, she is going to stay here a little while," and he said, "Sister, are you going?" and Doctor Hall said, "No, she is going to stay here a little while."

Q. Go ahead—what else happened?

(Testimony of Charlotte Geis.)

A. Then after he went out, Dr. Hall—(cries).

Q. Then what?

A. (Witness continues crying.)

Q. When you said that “he went out,” you meant Charlie?      A. Yes.

Q. Then what happened?

A. He put his hand under my bloomers.

Q. You were sitting on his lap?      A. Yes.

Q. Were you sitting on his lap while Charlie was there?      A. Yes.

Q. How long was Charlie there?

A. I don’t remember. I don’t think he was there very long though.

Q. But Charlie was there part of the time at least while you were sitting on the doctor’s lap?

A. Yes.

Q. What were you talking about, and what was Charlie talking about, and what was the doctor talking about? Do you remember anything that was said? [171—125]

A. I was talking—

Q. Do you remember, Charlotte?

A. Well, I forget just what it was, but it was something about poison berries.

Q. Were you talking, or Charlie?

A. I was talking.

Q. About poison berries?      A. Yes.

Q. Where was Charlie when the doctor was dressing his head?

A. He was in the room. I think he was in the room where he has his patients. Where he fixes them.



(Testimony of Charlotte Geis.)

Q. You were there in the same room with Charlie and the doctor?

A. No, I was in the room where you go in, and my brother was in the other room. I don't remember if I was in the room where he was fixing my brother's head or not.

Q. While the doctor was fixing your brother Charlie's head, do you remember what you were doin'?

A. No.

Q. You were not talking to Dr. Hall, at all, I believe? I understood you to say a while ago that the doctor hadn't talked to you, or said anything to you, is that right? He never talked to you about anything particularly? A. No.

Q. And if you were talking about some poison berries—(interrupted).

A. Yes.

Q. —what were you talking with?

A. I was just saying that to Dr. Hall. [172—126]

Q. Let me ask you if you remember this. Think and see if you can remember this circumstance. You knew that Dr. Hall was dressing Charlie's head and you knew that it was cut by a baseball bat or something of that kind? A. Yes.

Q. And do you remember while he was doing that what you were doing? A. No.

Q. Do you remember taking some pencils or crayons and drawing on some paper that was there?

A. No.

Q. Do you remember anything about that?

A. No.

(Testimony of Charlotte Geis.)

Q. Do you remember that while you were there and while Charlie was there, when you were sitting on the doctor's lap that you said to the doctor in talking—you had been talking about this cut on Charlie's head—you said to the doctor "You never saw where I was cut." Do you remember that?

A. I just told him about that cut. I was cut right here (showing).

Q. Show the jury right where.

A. Right here (showing).

Q. Right on the leg? A. Yes.

Q. Do you remember showing the doctor where you were cut?

A. I didn't show him. I never pulled up my dress or anything. I just showed him through my dress.

Q. Are you sure of that? A. Yes.

Q. Now think back and think just exactly what happened at [173—127] at that time. When you were talking about this cut on Charlie's head, you said to the doctor, "You never saw where I was cut, did you?" A. No.

Q. What did you say about that? Did you show it to him through your dress?

A. I told him I had a cut, but I don't remember saying that that you said.

Q. You did say that you had a cut? A. Yes.

Q. Did you tell him where it was or did he ask you where it was?

A. I don't remember, but I showed it was right there (indicating).

Q. Do you remember how you got hurt or cut?

(Testimony of Charlotte Geis.)

A. Yes.

Q. How?

A. I was playing on some barrels and I was jumping from them, and I cut myself on a box. I jumped and I cut myself on the tin on a box.

Q. How long before you went up to Dr. Hall's office did that happen?

A. I don't think it was a week before.

Q. Who attended to that and who dressed that? Dr. Hall didn't have anything to do with that?

A. No. Mrs. Hanson and father.

Q. Mrs. Bert Hanson? A. Yes.

Q. She was staying at your house at that time?  
[174—128]

A. No, she was not staying there.

Q. But she used to be there a good deal?

A. Yes.

Q. And they dressed it? A. Yes.

Q. How much of a cut was it? I mean was it a large cut? A. Quite large.

Q. This happened about a week before?

A. Yes.

Q. Don't you remember when you were sitting there upon Dr. Hall's lap, Charlie being there, I think, I don't know whether he was or wasn't, that you said to Dr. Hall, "You never saw where I was cut," and the doctor said, "No."

A. I don't remember saying that at all.

Q. How did you happen to mention to him the fact that you had been cut? A. I don't know.

Q. And don't you remember while you were sitting



(Testimony of Charlotte Geis.)

there that you pulled up your little dress?

A. No.

Q. And showed the doctor, and the doctor looked at it and said, "My, that was a cut"?

A. No.

Q. And the cut was right on your leg, don't you remember that circumstance?      A. No.

Q. But you do remember you say of telling Doctor Hall about it on that occasion?      A. Yes.

Q. At that time you told him about it?

A. Yes. [175—129]

Q. And just showed him through, pointed to the place?      A. Yes.

Q. That's the way you remember it?      A. Yes.

Q. What did the doctor say? Did he ask you how it happened?

A. I don't remember of him asking me how it happened, or about that.

Q. And you don't remember why you happened to speak to him about it?      A. No.

Q. Did Dr. Hall ever see that cut?      A. No.

Q. He never did see it at any time?

A. Shakes head in the negative.

Q. You are sure Dr. Hall never saw that?

A. Yes.

Q. You don't remember the circumstance, while Charlie was there, of your making drawings with some pencils or crayons that were there?

A. No.

Q. You don't remember whether you were in the same room with Charlie when his head was being

(Testimony of Charlotte Geis.)

dressed or not?      A. No.

Q. You are sure that Charlie went out of the room before you did?      A. Yes.

Q. Where did he go?

A. He went home. He went out of the door and went downstairs and I don't know where he went after that. [176—130]

Q. How long did you stay there after Charlie left?

A. Not very long.

Q. Had you taken any flowers up to Dr. Hall that day?      A. No.

Q. Had you before?

A. I don't know, I guess I had taken them up before.

Q. Do you remember of having done so?

A. Yes, I have taken flowers up to him, and when this happened I told mother about it. She wanted me to take some flowers up to him—(interrupted).

Q. Do you know Mr. Roth?      A. Yes.

Q. How long have you known him?

A. I don't remember.

Q. When did you first see him?

A. I don't know when it was that I first seen him.

Q. When did you first talk to him about this matter that you have told us about?

A. Oh, it was not long before I went to the show.

Q. To what show?

A. "What Happened to Jones."

Q. How long before that?

A. It was that same night.

Q. Where did you see Mr. Roth?

(Testimony of Charlotte Geis.)

A. Mr. Roth came to our house.

Q. How long was he there?

A. He wasn't there very long.

Q. About how long?

A. About fifteen minutes.

Q. Who else was present?

A. Mother. [177—178—131]

Q. Anybody else?      A. No, not in the room.

Q. That is what I mean, in the room. When did you see him the next time?      A. Mr. Roth?

Q. Yes.

A. I seen him when I came up here Saturday.

Q. Did Mr. Roth at that time talk about this matter up at your house?      A. Yes.

Q. What did you say at that time, Charlotte, to him?      A. I told him.

Q. Did Mr. Roth ask you to tell what you knew about this matter?      A. Yes.

Q. What did you tell him at that time?

A. I told him what I told you just now.

Q. The same?      A. Yes.

Q. Everything just the same?

A. Yes, but he asked me questions.

Q. Questions. Did he ask you anything about this scar?      A. No.

Q. This wound, this cut, that you had?

A. No.

Q. Did Mr. Roth know that that cut is there?

A. I don't know.

Q. Did you ever tell him about it?      A. No.

Q. Did Mr. Roth ask all the questions or did your



(Testimony of Charlotte Geis.)

mother ask some? [179—132]

A. Mother didn't ask any.

Q. Did she say anything when he was there?

A. She told me just to remember what happened there.

Q. Well, isn't it true that part of the things that you have told here upon the stand that you didn't remember and didn't tell Mr. Roth at that time?

A. I told him the things that I told just now.

Q. Just the same way?

A. I don't know what you mean.

Q. You know what you have just told upon the stand? A. Yes.

Q. Did you tell everything to Mr. Roth at that time that you have told on the stand?

A. He didn't ask me every question that he asked me at the time he was there.

Q. What ones didn't he ask you at that time, do you remembr? A. No, I can't think.

Q. Do you remember what Mr. Roth asked you first on that occasion?

A. Yes. He asked me how old I was when he first came.

Q. What else?

A. Then he asked me when my birthday was?

Q. Then what else did he ask you?

A. Then he asked me how old Josephine was.

Q. And you told him? A. Yes.

Q. Then what?

A. He asked me if I was ever at Dr. Hall's office. I don't know just what he said.

(Testimony of Charlotte Geis.)

Q. And you told him?

A. Yes.

Q. What did he ask you next? [180—133]

A. He asked me if Dr. Hall had ever done anything?

Q. What did you say? A. I said he had.

Q. What did he ask you then?

A. Then he asked me what he did.

Q. What did you say then?

A. (Witness begins to cry.)

Q. Not what you have told now, but tell me what you told Mr. Roth at that time, that he was up at your house? A. I told him what Dr. Hall did.

Q. What did you tell him?

A. I told him where he put his hand.

Q. And did you tell him that the first time that he asked you?

A. I told him he put his hand up under my bloomers (cries).

Q. What else did you tell him, Charlotte, anything, do you remember? A. No.

Q. Is that all that you have said to him; that he put his hand up under your bloomers?

A. Yes. And Mr. Roth said—then he asked me if that is where he put it, and I said “yes.”

Q. What?

A. He put his hand there, and he said if that is what Dr. Hall did, and I said “Yes.”

Q. What did Mr. Roth do at that time, in asking you these questions at that time? Eh? You say that he asked you if Dr. Hall had put his hand there?

(Testimony of Charlotte Geis.)

A. Yes.

Q. What did he do when he asked you that question?

A. If he put his hand right here (indicating) he said.

Q. What did you say?

A. I said, "Yes." [181—134]

Q. Did he ask you another questions?

A. I don't remember.

Q. No more questions? A. No.

Q. On the first time that he asked you that question did you say yes?

A. The first time what?

Q. The first time that Mr. Roth asked you that question? A. Yes.

Q. You remembered it, did you? Did he ask you any further questions about that at that time?

A. Yes. He asked me how he did it.

Q. What did you say?

A. He did this (indicating) with his hand, and I said "yes."

Q. When he would show you with his hand, you would say "Yes"? A. Yes.

Q. Isn't it true that at the time Mr. Roth was talking to you and asking you about his putting his hand down where you have described that you said you didn't remember about that?

A. I don't remember saying that.

Q. Just think and see of when Mr. Roth asked you whether or not Dr. Hall had done that, that you said that you didn't remember that, or couldn't re-



(Testimony of Charlotte Geis.)

member that?      A. No.

Q. Are you sure of that? Isn't it true that when Mr. Roth asked you about that that you told him that you didn't remember, and you didn't remember it until after he had talked with you for awhile?

A. Yes. I don't understand what you mean.

[182—135]

Q. When Mr. Roth first asked you about what Dr. Hall had done and where he had put his hand, and how he had put his hand, didn't you at that time say that it was either not true or that you didn't remember of it, or couldn't think of it?      A. No.

Q. And that it was only after he had talked with you quite awhile that you said yes that it was true? Isn't that a fact, Charlotte?

A. I don't remember of saying that.

Q. Do you remember of saying anything like that?

A. No.

Q. Isn't it true that Mr. Roth had to talk to you quite awhile before you said that Dr. Hall had done what you now describe?      A. No.

Q. Isn't it?

A. I don't remember whether it is or not.

Q. About how long was Mr. Roth there, do you remember that?      A. About fifteen minutes.

Q. What makes you say about fifteen minutes?

A. Because I don't think he was there very long. It was not very long before I got ready to go to the show, and it was about time when Mr. Roth got there to go to the show.

Q. What time was it when he came there, do you

(Testimony of Charlotte Geis.)

remember? A. No.

Q. Who else have you ever talked with about this matter besides your mother?

A. My mother is all, and Mrs. Hardin.

Q. That is Charles Hardin's wife?

A. Yes. [183—136]

Q. Did you ever talk with papa about it?

A. No.

Q. Have you ever talked with your brother, Charlie?

A. Yes, I told him the night this happened.

Q. Have you talked with him lately? And asked him if he remembered about this occasion and about being there? A. No.

Q. Do you know and realize what you are here for?

A. Yes.

Q. You understand that? A. Yes.

Q. You understand what it is to come into the court and testify? A. No.

Q. What I am trying to get you to explain is: If you realize what the effect of your testimony, if true, might be, and what if you are mistaken about it, it might be. Do you understand what Dr. Hall is here for and being tried? A. Yes.

Q. Do you understand that if he is guilty of what he is being tried for now, he would be punished?

A. Yes.

Q. Who told you that?

A. I think he would be. He ought to be anyway.

Q. Who told you that?

A. No one told me that, but I should think he would.

(Testimony of Charlotte Geis.)

Q. Do you understand what it is to take an oath?

A. Yes.

Q. Who told you about that?

A. My mother told me what it was. [184—137]

Q. What did she tell you?

A. She told me it was to swear to the truth.

Q. Have you tried to do that, Charlotte?

A. Yes.

Q. The best you know how? Who did you first talk to about this?

A. The first one I told it to?

Q. Yes. A. My brother.

Q. Who else have you talked to besides your brother, your mother, Mrs. Hardin, and Mr. Roth?

A. No one else at all.

Q. This was two years ago this August, or last August. 1913 you say it was?

A. Yes. It will be three years this August.

Q. How did you happen to sit in Dr. Hall's lap?

A. I don't remember.

Q. What was Charlie doing, when you were sitting in his lap, before he went out?

A. I think he was standing by the desk or by the door.

Q. Did he have a bandage around his head?

A. I don't remember whether he had a bandage around his head or not.

Q. While Charlie was there and before he went out, what were you doing while you were sitting on the doctor's lap? A. I don't remember.

Q. You don't remember what you were doing?



(Testimony of Charlotte Geis.)

A. No.

Q. You don't remember what he was doing?

A. No. [185—138]

Q. And you don't remember what he was saying?

A. No.

Q. Were you talking?

A. I was just talking about these berries and things.

Q. How long were you sitting on the doctor's lap?

A. I don't know.

Q. About how long? A. I can't say.

Q. Can't you give the jury any idea? A. No.

Q. Five minutes? A. I don't remember at all.

Q. How long were you gone from the house. How long were you down there from the time you left your house until you got back? A. I don't know.

Q. About how long?

A. I can't say. I don't know.

Q. What did you do the next day?

A. Went on an excursion.

Q. Where? A. Down the river.

Q. Did Charlie go with you? A. Yes.

Q. There was no school then? A. No.

Q. Then do you remember what you did the next day after that? A. No. Went to Sunday School.

Q. And the next day after that do you remember what you did?

A. No. Awhile after that we went over to see mother at the hospital. [186—139]

Q. That is, shortly after that? A. Yes.

Q. Do you remember when your mother came

(Testimony of Charlotte Geis.)

back from the hospital?      A. No.

Q. Was she over in the hospital when you told her about this?      A. No.

Q. Was she home?

A. She had come home when I told her.

Q. How long was she in the hospital after the baby was born?      A. I think eleven days.

Q. So it would be eleven days after the time you were up to the doctor's office?

A. I don't know. She went there I think it was in September or in August. She went in August and was there till in September, but I don't know how long.

Q. What did you say at the time you were on Dr. Hall's lap after he did what you say he did. What did you say to him?      A. No.

Q. Did he say anything?      A. No.

Q. Did you have a coat on at that time, or did you wear an overcoat at that time?      A. No.

Q. Did you have a hat on?      A. I don't know.

Q. You don't know long you were sitting in his lap?      A. No.

Q. You don't know how long you were there altogether?      A. No. [187—140]

Q. Do you know how long Charlie was there?

A. He went right after he had his cut fixed. He just stayed there a little while and then went out.

Q. And you don't remember what time that was?

A. No.

Q. And you don't remember what time it was that you got home?      A. No.

(Testimony of Charlotte Geis.)

Q. And you don't remember what time it was when you went there?

A. It was after dinner when we went there?

Q. But you don't know what time it was?

A. No.

Q. You went right home from there? A. Yes.

Q. Who was at home when you got there?

A. Mother and Mrs. Hardin and I don't know if Mrs. Hanson or some one was just going in the door, going home.

Q. Your mother was there?

A. Yes, she was talking to them. I don't know who it was, but I think it was Mrs. Hanson though.

Q. I thought your mother was over in the hospital?

A. Not when this thing happened. She went Saturday evening and this happened Friday.

Q. How long after your mother left the hospital, Charlotte, was it that you first spoke to her and she talked to you about it?

A. I don't remember, but—(interrupted).

Q. About how long after she came back from the hospital?

A. I can't remember how long after she came from the hospital, but I don't think it was very long, though. [188—141]

Q. She was there eleven days?

A. Yes, I think it was eleven days.

Q. Give us your best remembrance as to how long it was after she got home from the hospital before anything was said?



(Testimony of Charlotte Geis.)

A. I can't say, but she was able to get up and be about.

Q. Do you think it would be a week after she came back from the hospital or three or four days?

A. No, I don't think so. I don't remember at all.

Q. But it was after she came back from the hospital? — A. Yes.

Q. But you don't remember how long it was after she came home? — A. No.

Mr. MARQUAM.—That is as far on the cross-examination as I can go now, on the present information I have, on the case. I may have completed it and I may have not.

The COURT.—Is there any further redirect examination.

Mr. ROTH.—I want to ask one question.

Q. What was it Charlotte, that caused you tell your mother?

A. She wanted—(interrupted).

Mr. MARQUAM.—We object to that as irrelevant, incompetent, and immaterial.

(Objection overruled, defendant excepts, and exception allowed.)

A. She asked me to bring Dr. Hall some sweet peas and I wouldn't go.

(Mr. ROTH.)

Q. Yes? — A. Then I told her. [189—142]

Mr. ROTH.—I see. That is all.

(Trial continued until 10 o'clock to-morrow morning and the jury withdrew in the custody of the

(Testimony of Charlotte Geis.)

bailiffs, after having been admonished not to talk about the case, etc.)

Wednesday, April 21st, 1915, 10 A. M.

Defendant and jury present, Trial resumed.

The COURT.—(To Mr. MARQUAM.) Do you desire the witness, Charlotte Geis recalled?

Mr. MARQUAM.—No, sir.

Mr. ROTH.—I presume it will be stipulated that the Fairbanks that has been testified to in this examination is Fairbanks, Alaska, in the Fourth Judicial Division?

Mr. MARQUAM.—We are perfectly willing to stipulate to that. I think that is a matter that the Court can take judicial knowledge of, but if there is any question about it, we will so stipulate.

Mr. ROTH.—The Government rests.

(The following proceedings were had, within view of but without the hearing of, the jury.)

Mr. STEVENS.—Plaintiff having announced that the Government rests its case, the defendant now moves the Court to strike from the record of this case all of the evidence of the witness Charlotte Geis, and to instruct the jury to wholly disregard the same, for the reason: First, that the witness has shown herself disqualified to act as a witness in this case; second, that the matters and things testified to by said witness have not been connected [190—143] with the crime charged in the indictment, and that said testimony and the whole thereof, is entirely disconnected with any issue in this case; third, that the testimony of said witness is

(Testimony of Charlotte Geis.)

wholly irrelevant, immaterial and incompetent, and does not come within any rule, or exception to any rule recognized to be the law of the case.

The COURT.—Motion denied.

(Defendant excepts and exception allowed.)

Mr. STEVENS.—The defendant now moves the Court to strike from the record herein all of the testimony of Selma Lappi, for the reason that the said witness, owing to her youth and want of understanding, does not appreciate the obligation of an oath, and is shown by her said testimony to be an incompetent witness herein, and therefore the testimony of the said witness is incompetent in this case.

The COURT.—Which motion is denied.

(Defendant excepts. Exception allowed.)

Mr. STEVENS.—The defendant herein now moves the court to instruct the jury to find the defendant not guilty for the reason that the testimony offered upon the part of the Government and received by the Court is wholly insufficient to sustain a conviction in this case, for the reasons that the testimony of the witness Selma Lappi has shown her incompetent to be a witness; and for the further reason that the witness Charlotte Geis has shown herself to be incompetent as a witness herein, and that the matters and things testified to by her are not connected with this case, that the occurrences which she related upon the stand are too remote in time, and [191—144] otherwise wholly incompetent to show any design, intent or system of action upon the part of the defendant herein as



(Testimony of Charlotte Geis.)

to the matters and things alleged in the indictment herein; and for the further reason that the Court erred in permitting the witness Mrs. John Lappi to testify in this case that the said Selma Lappi made to her a complaint of the offense charged in the indictment; and for the further reason as above stated that the testimony is sufficient to sustain a conviction.

The COURT.—Which motion is denied.

(The defendant excepts and exception is allowed.)

(The following proceedings were conducted in the hearing of the jury.)

**[Testimony of Mrs. M. F. Hall, for Defendant.]**

Mrs. M. F. HALL, a witness for defendant, after being duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. MARQUAM.)

Q. Your name is Mrs. Hall?      A. It is.

Q. You are the wife of the defendant in this case?

A. I am.

Q. How long have you resided in Fairbanks, Mrs. Hall?

A. Since 1905, with the exception of three years.

Q. With the exception of what?

A. With the exception of about three years and a half.

Q. Your name was Cecelia Stroup before you were married?      A. Cecelia Stroup. [192—145]

Q. When were you married?

A. On March 7th, 1914.

Q. How old were you when you came to Fairbanks?

(Testimony of Mrs. M. F. Hall.)

A. I was fifteen.

Q. With the exception of the three and a half years, you have resided in the town of Fairbanks?

A. I have.

Q. During that three and a half years, was that the time you were at Ruby?

A. Two years of that I was at school, one year at Ruby, and half a year outside. Those two years I was at school, I was in the State of Washington.

Q. You were teaching here, were you not, during part of your residence here?

A. I was for three years.

Q. Since your marriage, Mrs. Hall, where have you resided in Fairbanks; where has been your home in Fairbanks?

A. When we were first married, we lived in the Jesson residence on Cushman Street, and then we built our new home and we have resided there since January 9th.

Q. That is a block down Cushman Street?

A. That is between 6th and 7th.

Q. Mrs. Hall, I will ask you if sometime this last fall in the latter part of September or first part of October, you ever received a letter or a note from Mrs. Lappi?      A. I did.

Q. Do you know Mrs. Lappi?      A. I do.

Q. Did you know her prior to that time?

A. I did.

Q. How long had you known her? [193—146]

A. In the latter part of July I was introduced to her.

(Testimony of Mrs. M. F. Hall.)

Q. Of last year?

A. Yes. In the doctor's office. The doctor introduced her to me there.

Q. That was the first time that you met her?

A. That was the first time.

Q. Where were you when you received this letter or note from Mrs. Lappi?

A. I was in Dr. Hall's office.

Q. Was there anybody else there at that time?

A. Yes, there was a patient there waiting for the doctor. The doctor was at the hospital. I was talking with the patient there at the time.

Q. What time of day was that?

A. In the forenoon, I judge about half-past ten or eleven, perhaps half-past eleven. I don't know the exact time.

Q. Have you that letter?

A. I have not. I destroyed it.

Q. At that time?

A. Yes, I destroyed it at that time.

Q. Can you tell the jury the contents of the letter or note?

A. In this letter it said "Mrs. Hall. You had better stay at the office and watch your husband and see that he lets little innocent girls alone."

Q. Was it signed?

A. Yes. "Mrs. John Lappi."

Q. How was that letter delivered to you?

A. The messenger brought it to me, handed it to me.

Q. What did you do after receiving the letter?

A. I immediately put on my hat and coat and went



(Testimony of Mrs. M. F. Hall.)

right straight to Mrs. Lappi, to Mrs. Lappi's home.  
[194—147]

Q. Where was she living then?

A. She was living on Cushman Street, just beyond Eleventh. I think it was Eleventh.

Q. What occurred after you arrived at the house? Just tell the jury what was the first thing that occurred.

A. Well, I took the note, and I asked her, I said, "Mrs. Lappi, did you write this note?" She said "I did," and she commenced to cry, and she made the statement that my husband was a brute. She was very much worked up and very much frustrated. And I asked her what this note meant. At first she didn't want to tell me, and she said, "Mrs. Hall, my child came home last Thursday looking very much flushed and very red in the face. And I had been hearing stories about other little girls, rumors, and I was very much frightened and I commenced to question the child. At first the child said there was nothing the matter with her." And, she said, "I questioned her, and finally I found out what he did."

Q. Go ahead.

A. Then I insisted that she should tell me what it was and she said—(interruption).

Q. Did she decline to tell you at first?

A. She did. She did not want to tell me. She said, "I don't want to tell you. I will tell you when Dr. Hall is present," and I simply said I wanted to know what the accusation was.

Q. You say you insisted on knowing it?

A. I did.

(Testimony of Mrs. M. F. Hall.)

Q. What did she say at that time?

A. She said that the child—that Dr. Hall had put his hand on her stomach, on the little stomach, to see if she was fat and had told her that she was getting much fatter, and that [195—148] *and that* he unbuttoned her little panties and kissed her little bottom.

Q. Are those the exact words she used?

A. Those are her exact words.

Q. State what day it was that you received this note? A. This was Tuesday, September 29th.

Q. Did she tell you at that time when this was supposed to have occurred?

A. She told me it was supposed to have occurred the Thursday previous, which was the 24th of September.

Q. I wish you would state again what she said the child first said to her when she talked about it.

A. Well—(interruption).

Q. If you can use her exact words or as near as you can recall them.

A. She said that she questioned the child, and the child said there was nothing the matter with her, and she questioned her and finally found out.

Q. Did she say that she found out as the result of questions or by any other method?

A. She simply stated just as I have told you; that she questioned the child and at first the child said there was nothing the matter with her, and she said she still questioned the child and she finally told her—finally found out.

Q. Now, Mrs. Hall, you say that Mrs. Lappi did

(Testimony of Mrs. M. F. Hall.)

not want to tell you about this matter but that you insisted?     A. Yes, sir.

Q. State to the jury why you insisted upon knowing about this matter.

A. Well, because—(interruption).     [196—149]

(Objection by attorney for plaintiff, that the question is irrelevant, incompetent and immaterial.)

The COURT.—She may answer the question.

A. Because I loved my husband very dearly and we have always been very happy together, and if my husband had done anything dishonorable I wanted to know about it, and if after hearing both sides of that question I thought he was guilty of any such thing, I should hate him with all the hatred my heart would bear, and I should never want to see his face again.

Q. That was the reason of your insisting at that time?     A. Exactly so.

Q. How long were you at the house, Mrs. Hall?

A. I don't know the exact time, but I went in and did not sit down, and it was just long enough for this conversation to take place, I should judge about eight or ten minutes.

Q. I will ask you if at the time you were at the house, or at any time, you ever said to Mrs. Lappi, and begged of her to protect you and to protect your name and not to tell about this thing?

A. No, I did not. The only thing that she might have misconstrued into that meaning was that she made the statement that she was not going to keep quiet about this, that she was going to tell this to everybody she knew and everybody in town, and I simply said that she had better not do such a thing,



(Testimony of Mrs. M. F. Hall.)

until she found out exactly what did happen.

Q. Did she say anything about having talked to Dr. Hall?

A. She did. She told me that she had been to Dr. Hall the day before and had talked with him about it.

Q. Did she say anything at that time about any statement that Dr. Hall had made her, or about her listening to him, or anything of that kind [197—150]

A. She said that she wouldn't listen to him at all. She said he wanted to talk to her, and told her not to talk so loud and give him a chance to talk, and she said she wouldn't listen to him.

Q. Then you say she said she was going to tell everything she knew about it, and that you asked her not to do so until she found out what the truth was?

A. Yes, sir.

Q. Was there anything else that occurs to you that took place at that time, Mrs. Hall, with regard to any conversation or statement that she made?

A. She made several statements, and she said—(interruption).

Mr. ROTH.—We object to that—(interrupted).

A. One statement she made was that her husband had just gone perhaps a week before that and that he had paid Doctor sixty dollars and she said, "He will never get another cent."

Q. She made that statement at that time?

A. She made that statement to me.

(Mr. MARQUAM.)

Q. Is there anything else that you can think of

(Testimony of Mrs. M. F. Hall.)

that occurred or was said between either of you at that time?

A. Well, of course, when I went there, Mrs. Lappi was very much frustrated and very nervous, and she cried, and she said that she hoped that I wouldn't feel offended; that she had nothing against me, and that she was sorry for me, and that she hoped—that she didn't mean anything against me and she hoped that I wouldn't be offended. And I simply answered her that I wasn't offended at all; that I was glad that she had told me.

Q. Was there anybody else present? Was the little girl present at that time? [198—151]

A. No, the little girl was at school.

Q. I will ask you if Mrs. Lappi made this statement to you in describing what had occurred after you had insisted on knowing; that the little girl came home very much out of breath, and she illustrated to you by panting, showing that she was out of breath, and saying, in repeating the conversation that occurred between her and the child at that time, that the little child said to her immediately when she came into the door, "Oh, darling mamma," or words to that effect, "Dr. Hall unbuttoned my panties and felt me all over to see how fat I was." Did she tell you that or anything of that kind?

A. No, sir, she did not. She simply said to me that the child came home looking very much flushed and looking very red in the face, and she said, "I had heard rumors and stories about other little children, and I was very much frightened and I commenced to question the child," and she said, "At first the



(Testimony of Mrs. M. F. Hall.)

child said there was nothing the matter with her and I questioned her and finally I found out.”

Q. She didn't explain or say what she found out?

A. No, sir. Those are her exact words.

Q. Now, during the time after your marriage, and after the time that you lived in the Jesson house—I believe that was the place you first resided after your marriage? A. Yes.

Q. You were having your home fixed up, were you not, where you now reside? A. Yes.

Q. Now, during the time that the work was going on there where did you reside, Mrs. Hall?

A. At first, after we first moved out of the home, we lived in the hotel for a while, then we put up two tents on the [199—152] lower end of our lot there and we camped out there for a considerable length of time.

Q. During that time where did you spend a great deal of your time?

A. Of course at that time I had no home duties at all, and I spent all of my days in the office, the forenoons and afternoons. Just as soon as I was through with breakfast in the morning I went to the office. Previous to that I had been in the office at times, but it had been mostly afternoons, because I had my home work to do in the forenoons. But at that time we were living at the restaurants and I had no home duties, and as soon as we had our breakfast finished, Doctor and I both went to the office, and he went to the hospital and did his work and when he returned, we worked together. When he had examinations, microscopic examinations and tests to make, we



(Testimony of Mrs. M. F. Hall.)

always made them together, and studied them out together, and he dictated his correspondence to me, and I wrote it for him on the typewriter, and I helped him keep his books, and in that way we always worked together.

Q. During the times that you were at the office on account of your home being torn up and being fixed up, when did that commence?

A. That commenced about the first of August and from that on until about the 9th of January when we moved into our new home.

Q. What year was that?

A. That was the fall of 1914 and up until January 9th, 1915.

Q. You know the little girl Selma Lappi?

A. I do very well. [200—153]

Q. How many times have you seen her there at the office? About how many times have you been at the office when she was there?

A. About every time she came, since the first of August—at least thirty times.

Q. At least thirty times that you have been there?

A. Yes.

Q. Do you know how many treatments she received at the office?

A. At the office I think forty-one treatments. Four of those were in July.

Q. How do you know that?

A. Because I always helped Doctor with his books.

Q. There is a record kept?

A. There is a record kept of everything that happens, everybody that comes into the office, and every-

(Testimony of Mrs. M. F. Hall.)

thing that transpires.

Q. How many treatments were there altogether at the hospital and office?

A. I believe there are fifty-eight visits made altogether, counting the hospital.

Q. You are just testifying from memory now?

A. Yes.

Q. You think you were at the office upon probably thirty occasions when the child was there?

A. At least that many.

Q. When the child would come there to receive a treatment where would it occur ordinarily, that is, in which room?

A. In the consultation room.

Q. Describe to the jury how the rooms there were fixed and how many rooms there were, and how they are situated. This is in the Red Cross Building, is it?

A. Yes. We have two rooms, one is the reception room there [201—154] where the patients wait their turn, and the other is the consultation-room where all of the Doctor's instruments—where his instrument case is, and he has two glass tables there, and all his things that are necessary for his work.

Q. His operating-table?

A. Yes, his operating-table, and his desk, and a couch.

Q. And, as I understand you, during the time that the child would be there on these occasions you would be there in this room where she was?

A. I would. Many times, many, many times, I assisted Doctor with his dressings.

Q. What was the ordinary course of treatment



(Testimony of Mrs. M. F. Hall.)

while the child was there, describe to the jury, that is, that you know of your own knowledge, that you saw.

A. The child—Doctor performed an operation on the child's neck at the hospital during the latter part of July.

Q. Were you present at that?

A. No, I was not present at his work at the hospital. After a few days, after the child was able to come to the office, she came to the office for dressings, and the Doctor placed the dressings over the wound, and placed cotton over it, and put a bandage around it.

Q. What kind of a bandage?

A. At first he used just a gauze bandage, we call it. It is cloth, wrapped it around and fastened it on there. And after while the dressing wasn't so much, the wound wasn't so large and the dressing wasn't so large, and this was removed and after the dressing was put onto the wound, he placed a piece of cotton sufficiently large to prevent anything from hitting it or disturbing it in any way, [202—155] and this was held on by a piece of rubber adhesive bandage, which was placed around the child's neck over the top of this dressing. Now, the next time that this was to be dressed, doctor took the scissors and cut that place, cut the bandage open right over the dressings where this cotton was, then he laid open that bandage, just laid it back, and didn't have to pull it off the neck at all, laid it back and took it with his hand and made his dressing. Then he folded it back and put a piece of adhesive over that in order to hold that shut. Now, perhaps, every four or five days,



(Testimony of Mrs. M. F. Hall.)

this bandage had to be entirely removed from the neck because if it was left there the pores of the skin would be sealed up and little places would be liable to fester under there, so it would be necessary to remove this. Now, in removing this, it was a little bit painful and sometimes some of the rubber, in fact, always, some of the rubber adheres to the skin. Now, to remove this rubber, the doctor takes a piece of cotton and moistens it with chloroform, and rubs off this rubber. Now, it appears that the child, of course, had taken chloroform when she had had her operation, and the smell of this chloroform just seemed to throw the child out of her head, and I have seen her when doctor would pick up the bottle—when he went to make the dressing, he would always seat the child on the edge of his operating table—and when he would pick up this little bottle of chloroform from the glass table and bring it over and open it up, with his piece of cotton, I have seen the child just intensify her muscles and throw herself backward on the table and just scream. The fumes of it seemed to frighten her. On one occasion, she threw herself backward on the table [203—156] and just screamed, “Don’t spank me any more. Don’t spank me any more. I will be good. I will be good.” And the doctor hadn’t touched her.

Q. You were there all that time?

A. Yes. I was there sitting in the doctor’s chair at that time.

Q. On how many occasions have you been present in the office when it has been necessary to use chloroform in removing these rubber bandages that you

(Testimony of Mrs. M. F. Hall.)

have been speaking about?

A. I should think about six or eight, something about there. Then at times, I have seen the child when she saw that doctor was going to use the chloroform, put one hand over her mouth, and with the other hand hold her nose, and sit there and choke and gasp and gasp. She would hold her breath and her face would be all flushed and she would work herself up into such a state of excitement that she would just simply seem to lose her head.

Q. Would that occur every time that chloroform was used about her?

A. Every time that chloroform was used about her, she was frightened and acted in that manner.

Q. Were you present and were you in the office on the Thursday in question in this case, that is on Thursday, the 24th of September?

A. No, sir, the last time I was present in the office was the time before the last time she came, which was on the 21st of September, Monday, the 21st of September, and the wound was almost healed then and he put just a small dressing on it, and put just a little piece of adhesive across the top of it, and he told her that she should come back Thursday, and very likely that would be the last time she would have to come. [204—157]

Q. The last visit before Thursday was when?

A. On Monday, the 21st of September. That was the first time I was present when the child—(interrupted).

Q. You were around the office most of the time,



(Testimony of Mrs. M. F. Hall.)

but happened to be out on this occasion?

A. I just happened to be absent. The doctor and I went to lunch together and after we were through I stopped to do something or other, and he had to hurry down to meet his appointment.

Q. What time did you usually have lunch?

A. We didn't have any special time. We have lunch when doctor is through with his work, and he is at leisure, sometimes at one, sometimes at two. At various times, I judge that it was about half an hour or three-quarters of an hour after Doctor came to the office that I came.

Q. Upon these occasions when the child was being treated and when it was necessary to use this chloroform to remove this rubber cement or rubber bandage from her neck, just state what you would do on those occasions by reason of those actions of hers, and what the doctor would do. Convey to the jury, if you can, an accurate idea of what occurred.

A. We are both very sympathetic. We both have sympathetic natures, and when it was painful to the child and when the child was frightened that way, after the dressing the doctor always—many times would pick her up from the operating-table and toss her in his arms and sit down on the edge of the couch with the child and take her on his knee and I would come over and put my arms around her and tell her that she was a good, brave, little girl and the doctor didn't like to hurt her, and the next time it would not hurt as much. And possibly I would have a piece of [205—158] candy there and I would give her



(Testimony of Mrs. M. F. Hall.)

a piece of candy, and perhaps give her a little piece of candy to take home to her brother. The same as I did when he treated my little brother when he broke his arm. He was a brave little fellow, and the doctor would take him on his knee and give him candy and tell him how brave a little boy he was.

Q. How often have you given this little girl candy yourself?     A. Quite a few times.

(Mr. Roth objects to the testimony as to other children.)

Q. My question was with regard to this child, Selma Lappi. On how many occasions while she was there had you occasion to give her candy as you had to other children?

A. That is a hard question to answer. Whenever I had it there in the office, and I had candy there many times.

Q. On how many occasions while you have been present has this occurred; when the doctor would take the child after one of these spells on his lap and try to quiet her afterwards? About how many times have you seen that?

A. Every time that she acted this way when the chloroform was being used, and at times when he removed this bandage from her little neck, and of course it is painful when the rubber is torn from the neck.

Q. About how many times have you seen the doctor take the child upon his knee while you were there, of your own knowledge?

A. I wouldn't know how to state how many times

(Testimony of Mrs. M. F. Hall.)

I have seen him, but many, many times. Whenever the child cried, whenever she had been in pain.

Q. Would you please describe to the jury what the appearance of this child would be after having gone through one of those spells that you describe, by holding her nose or [206—159] mouth, or by stiffening herself, or whatever was done, What was her appearance after having gone through one of those spells?

A. She would just work herself up until she was nervous and she would shake all over, and she would gasp and gasp and wouldn't let herself breathe, and it seemed that her blood would rush right to her head, and she was always flushed and very nervous about like a child would be when she was frightened.

Q. Would anything of that kind occur on any occasion when chloroform was not used?

A. No, just when the chloroform was used.

Q. Can you tell whether it was the actual smell or fumes of the chloroform or anything else that started her on those occasions? Describe to the jury just how that arose.

A. Well, she always said she didn't like the smell of that. I supposed it was because she had taken this chloroform when she had had her operation, and it probably made her sick when she was coming out of the effect of it. And the smell of that always seemed to bring that back to her mind.

Q. How long, ordinarily, after having finished the treatment of the child would the child remain in the office while you were there?

(Testimony of Mrs. M. F. Hall.)

A. Just a few minutes. As I just told you, the doctor would take her up and put her on his knee and try to quiet her, or I would perhaps try to quiet her just a little, and would assist her in putting on her hat and coat, and she would go home. [207—160]

Q. How long would this appearance that you have described, or can you tell us—that is, the flushed appearance by reason of these things you have told us about—would that immediately disappear or continue?

A. No. Of course that would continue, because she was worked up so it would last quite a length of time.

Q. How long is the longest time that you remember of her having been in the office after she was through with her treatment?

A. Just a few minutes, probably ten or fifteen minutes. Perhaps not that long, it is hard to state that.

Q. After you had gotten through with your visit to Mrs. Lappi by reason of this note that you had received, where did you go?

A. I went right straight to doctor to find out what he had to say about it.

Q. That same day?

A. Just right straight from her house, right straight to the doctor. When I left, doctor was at the hospital and I was talking to his patient. He had a patient there waiting for him in the office, and by the time I returned from Mrs. Lappi's home, doctor had returned to the office, and immediately when



(Testimony of Mrs. M. F. Hall.)

I got the chance I immediately talked to him.

Q. You immediately took this matter up with him?

A. Yes.

Q. You spoke about one occasion about the child having said something about "Don't spank me," when was that, do you remember?

A. No, I can't remember. [208—161]

Q. Just what did she say during that time, do you remember? Just describe everything that was said, if you can.

A. Doctor set her up on the edge of the table and when he went over—before he had touched her at all—he went over to the glass table to get his chloroform and his piece of cotton—and when he went to remove the cork and dampen that piece of cotton, she just intensified her muscles and threw herself backward on the table and just screamed and she said, "Oh, Doctor, don't spank me any more. Don't spank me any more. I will be good. I will be good," and the doctor hadn't touched her before that.

Q. You don't remember on what particular occasion that was? A. No, that was just one time.

Q. Did that same thing in reference to the doctor's spanking her occur at any other time than that one?

A. No, only that once.

Q. There would be some difference in the way she would act on different occasions?

A. Yes, at times she wouldn't scream at all. She would just act as I told you. She would put one hand over her mouth and one hand over her nose and not allow herself to breathe and just sit there

(Testimony of Mrs. M. F. Hall.)

and shake and shiver and work herself up until she was simply flushed in the face and nervous.

Q. And the last time you were there, which was next to the last visit, as I understood you to say, so there will be no question about it, describe at that time what was done in the way of dressing this neck and what was put on, if anything.

A. Well, the wound was nearly healed at that time, and just a small dressing was necessary and over the top of this was put a little, small piece of adhesive plaster, [209—162] adhesive bandage, to hold this dressing in place. Then a handkerchief was placed around that, around her neck.

Mr. MARQUAM.—You may cross-examine.

Cross-examination.

(By Mr. ROTH.)

Q. How old did you say you are?

A. Twenty-five. My birthday is the 2d of October, and this year I will be twenty-six.

Q. When were you married to Doctor Hall?

A. On the 7th of March, 1914.

Q. How old is Doctor Hall?

A. Fifty years old the 29th of last November.

Q. How long have you been acquainted with Doctor Hall?

A. Since I first came to Fairbanks in 1905. I was just a child and his children were here then, and we went to school together and played together.

Q. You worked in Dr. Hall's office, didn't you?

A. My sister worked in Dr. Hall's office.

Q. Didn't you?

(Testimony of Mrs. M. F. Hall.)

A. No. Well, my sister Margaret worked in Dr. Hall's office from the 21st of June, 1910, until the 7th of August, when she left for the Outside to go to school. Now, from the 7th of August until the 2d of October I was in the office off and on at times. Of course, I was teaching, and when school began I wasn't in the office very much. But on the 2d of October my youngest sister, Josephine, began to work in the office.

Q. How old was she then?

A. Let's see. That was in 1910 and she is now 20 years old. She was fifteen.

Q. Fifteen years old then. How old was your other sister [210—163] when she worked in there.

A. She was seventeen.

Q. You never worked in Dr. Hall's office before you taught school? A. I did not.

Q. What was it that was in that letter that you received from Mrs. Lappi?

A. "Mrs. Hall, you had better stay at the office and watch your husband, and see that he lets little innocent girls alone." Signed "Mrs. John Lappi."

Q. You destroyed the letter?

A. I destroyed it. I showed it to doctor and then I destroyed it.

Q. And you immediately went to see Mrs. Lappi?

A. I put my hat and coat right on before the messenger was out of the door, and I went right straight to her.

Q. When you got to the house, Mrs. Lappi was in a very excited condition, as I understood you to say?



(Testimony of Mrs. M. F. Hall.)

A. Well, when I came to the door, Mrs. Lappi came to the door, and she opened the door, and she was just as she would be at any time at that instant. But I showed her the note and I said, "Mrs. Lappi, did you write this note?" She said she did and she commenced to cry and was very nervous and frustrated.

Q. She was perfectly calm before you showed her the letter?

A. Apparently so. She came to the door the same as anyone would when anybody came to their house, and the minute she opened the door I showed her the letter, and I said, "Mrs. Lappi, did you write this note?" And she said "I did."

Q. And she commenced to cry immediately?

A. Yes. [211—164]

Q. That note had been delivered to you by a messenger boy? A. By a messenger.

Q. So evidently it was intended that you should get the letter personally?

A. Yes, sir, I suppose so.

Q. Now, what was said right away, immediately after you showed that letter to Mrs. Lappi?

A. I said, "What does it mean?" She said, "Your husband is a brute, and I am sorry for you, little girl. You have never done anything to me." And I said, "Well, what did he do?"

Q. And what did she say?

A. She said, "Mrs. Hall, last Thursday my child came home looking very red in the face and very much nervous and I questioned the child and the child said there was nothing the matter." "I had heard

(Testimony of Mrs. M. F. Hall.)

remarks about other little children and I was very much frightened, and I questioned the child and the child said there was nothing the matter, and I still questioned the child, and I finally found out."

Q. Well, then, what did she tell you that she had found out?

A. I insisted upon knowing. She said, "I don't want to tell you until Dr. Hall is present." But I said, "I want to know." So she said, "Well, he put his hand on her little stomach to see if she was fat, and then he opened or unbuttoned her little panties and kissed her little bottom." Those are her exact words.

Q. That is all she said to you?

A. I said, "Is that all he did?" and she said, "Yes."

Q. She told you that that was all?

A. She did. [212—165]

Q. She didn't tell you that Dr. Hall had put his hand upon the private parts of her person, right down here on her person, and felt of her?

A. No.

Q. You are sure she didn't tell you that?

A. No, Mr. Roth, she did not.

Q. You are positive of that, are you?

A. I am positive of that.

Q. And you are positive that the reason why she was worked up at that time was simply because Dr. Hall had felt of her stomach to feel how fat she was?

A. I don't understand your question. Do you

(Testimony of Mrs. M. F. Hall.)

mean that the child was worked up because—(interrupted).

Q. No. That Mrs. Lappi. You say that she was all worked up and excited? A. Yes.

Q. And frustrated, as you put it? Now, you are satisfied that she was worked up and frustrated because the child, Selma, told her that Dr. Hall put his hand on her stomach to see how fat she was?

A. Well, I didn't make that statement. It would be hard for me to tell.

Q. I am asking you if that is not true?

A. I don't know. It would be hard for me to say why she was frustrated. I suppose it was because she thought some wrong had been done to her child.

Q. But she told you what it was. She told you that he simply put his hand on the child's stomach to see how fat she was, didn't she?

A. She told me exactly what I told you.

Q. That is exactly what you told me, isn't it? I want to [213—166] be perfectly fair and frank with you.

The COURT.—That is only part of what she told you, Mr. Roth.

(Mr. ROTH.)

Q. Well, then, you are satisfied that she was frustrated simply because the child told her that the doctor had opened her panties and put his hand on her stomach to see how fat she was?

A. I didn't say that.

Q. What did you say?

A. I said that she said that Dr. Hall put his hand



(Testimony of Mrs. M. F. Hall.)

on her little stomach to see if she was fat. That often occurs, because doctor has often explained to me—(interruption).

Q. I am not asking you about that. I am asking simply about what excited Mrs. Lappi down at the house there.

A. Well, I beg your pardon. Well, now, I'll tell you. She said, "Dr. Hall put his hand on her little stomach to see if she was fat, and told her she was getting much fatter since the operation—(interrupted).

Q. And kissed her little bottom?

A. Now, wait a minute. "And he opened her little drawers, unbuttoned her little panties," she said. Those are her words, "and kissed her little bottom." Those were her exact words. And it would appear to me that the whole thing was the reason she was frustrated, exactly what I have told you.

Q. When she told you that, what did you tell her? What did you say?

A. What did I say to Mrs. Lappi?

A. Yes.

A. She said, "I hope you will not be offended at me. I have nothing against you." I said, "I am not, and I am very [214—167] glad you told me, and I will go right straight to doctor and find out what he has to say about it."

Q. Did you cry?

A. Naturally. Any woman would. It was a terrible shock to any one to be even accused of such a thing.

(Testimony of Mrs. M. F. Hall.)

Q. What else was said between you and Mrs. Lappi there that you have not stated, if anything was said, during your stay there?

A. I do not remember of anything else.

Q. How long did you remain there?

A. Just long enough for that conversation to take place. It would be hard to say exactly, but I would judge probably eight or ten minutes. I didn't sit down at all. I just simply went just inside the door and of course she closed the door, and the conversation took place and that was the end of it, and I went right straight back to the office.

Q. How many times did you see chloroform used upon the neck of Selma Lappi in the treatments?

A. Perhaps six, about six or eight times.

Q. That you saw it yourself? A. Yes, sir.

Q. Were you present at every time that chloroform was used upon her neck in the dressing of that week? A. I was not present the last time.

Q. You don't know what was done the last time because you were not present?

A. Well, I will tell you. Do you want me to answer that?

Q. You were not present consequently you don't know what was done, do you?

A. I know what was to be done. The dressing before the last doctor put a small dressing on, just a small piece of [215—168] adhesive, and of course, that adhesive had to be removed with chloroform the same as other times.

Q. That adhesive could not have been removed with anything else than chloroform?

(Testimony of Mrs. M. F. Hall.)

neck? A. I was not present the last time.

A. It can be taken off, but it leaves a deposit of rubber on there that has to be removed.

Q. Isn't there anything besides chloroform that would remove adhesive?

A. Nothing that I know of that would take it off entirely. I don't know everything that a doctor knows. That is what we always used.

Q. You don't know that anything else would release the adhesiveness of that plaster, do you, anything else besides chloroform?

A. To release the adhesiveness of it?

Q. Yes.

A. The adhesive plaster is taken off. It is not to release the bandage itself, but it is to take off the rubber deposit that is left after the bandage is removed.

Q. There is not anything else besides chloroform that would take that off?

A. Not that I know of. Of course I may not know.

Q. At least Dr. Hall never used anything else on Selma Lappi's neck, to remove that that you know of, except the chloroform?

A. Yes, sir. Except the chloroform.

Q. And notwithstanding the fact that she almost went into convulsions when he used it, he kept on using it when it was necessary to take that off?

A. If it had to be used what would you do in a case like that? It had to be removed. We didn't like to see her suffer, [216—169] and we always did it as quickly as we could, and comforted her as much



(Testimony of Mrs. M. F. Hall.)

as possible, didn't hurt her any more than necessary

Q. And you say you have seen Dr. Hall take her in his arms and toss her up in his arms?

A. Yes, just the same as he treats all children that come into the office there.

Q. Do you know John Lappi, the father of Selma?

A. I was introduced to him, but I do not know whether I would remember his face or not. I was introduced to him at one time in the office by the doctor himself?

Q. He was present one time when that chloroform was used?

A. Yes, I believe he was. When Mr. Lappi was there I wasn't in the room where the child was, you understand.

Q. You were not?

A. No, that is, I wasn't out in the room when the doctor was making the dressing. You understand what I mean?

Q. Yes.

A. Because I was out in the other room when her father was there.

Q. When she screamed and yelled when Mr. Lappi was there, you didn't go into the room?

A. Certainly not. I never go into the room unless I am called.

Q. But you were always called before when she screamed?

A. When a child comes to the office I generally— if there is no one with that child I always go into the room with the doctor and always assist. When

(Testimony of Mrs. M. F. Hall.)

she was having these little dressings made, often times her little dress would be a little bit high in the neck and it had to be unfastened and thrown back so the doctor could dress her neck [217—170] properly. I always did that, and also fastened it up afterwards, and assisted him by handing him the things that were necessary for him to work with, and then I held the child's head and soothed her.

Q. Do you remember the date of this operation from the book? A. There were two operations.

Q. I mean the final operation? A. What?

Q. The operation when Selma Lappi was placed under chloroform, the real, final operation?

A. No, I do not know that date exactly, because those things transpired at the hospital, I could find out by looking at the books.

Q. You have already stated that you had examined the books and you stated about the number of times that Selma Lappi had come down there?

A. Yes, I stated about the number of times.

Q. You don't know the exact date of this operation?

A. The first operation was some time in the latter part of July, sometime about the 24th or 25th.

Q. But I mean the final operation? You don't know the date of that?

A. The final operation was in August some time. I do not know the exact date of that but I can look it up.

Q. Now, at this time that Selma begged the doctor not to spank her any more and she would be good,

(Testimony of Mrs. M. F. Hall.)

evidently she was in hysterics at that time, or was out of her head? What would you call it?

A. I don't know what you would call it. She simply was so frightened at that chloroform that she simply made that statement and as I told you, doctor hadn't put his hands [218—171] on her at all, simply lifted her and put her on the table, hadn't touched her in any way. I don't know how she could think he would spank her.

Q. She was either in hysterics or convulsions or out of her head?

A. She acted that way, I don't know what you would call it.

Q. That was not the last time you saw the doctor use chloroform? A. No, sir.

Q. Notwithstanding the fact that that chloroform acted that way upon her, the doctor kept on using the chloroform just the same way as that?

A. He had to when this bandage had to come off.

Q. Well, he did?

A. He did. He is always gentle with children. He didn't hurt her any more than necessary, and when he used that he used it very quickly so it wouldn't hurt her and so he wouldn't cause her any more trouble than necessary.

Q. Was Monday before this eventful Thursday the last time that Selma Lappi was at the office?

A. Monday, September 21st, was the last time that Selma was there when I was present, and the next time she came was this Thursday, the 24th, which was the last time she came.



(Testimony of Mrs. M. F. Hall.)

Q. Wasn't she there between Monday and Thursday?     A. She was not.

Q. How do you know?

A. Because I was there every day between that time, and it is not on our books.

Q. It is not on your books?

A. No, sir. In the evening after all business is closed, after office hours, I have a slip of paper and I write down all the names of everybody who has been in the office [219—172] and enter them on the books.

Q. Were you present in the office on Monday?

A. I was.

Q. When Selma was there?     A. Yes.

Q. And you saw the treatment she received?

A. I did.

Q. This was on Monday before the 24th of September, 1914?     A. Yes, it was on September 21st.

Q. You know just exactly the character of the treatment she received there at that time?

A. Yes. The wound was almost healed. Just a little dressing had to be put on and held on with a small piece of adhesive plaster, adhesive bandage. [220—173]

Q. A kind of adhesive bandage was this that you refer to, just the ordinary adhesive bandage that comes on a spool?

A. It comes on a spool. It has a rubber lining to it, and it adheres when it is put in direct contact with the skin or with any object, it adheres to it.

Q. It is just ordinary court-plaster that is on

(Testimony of Mrs. M. F. Hall.)

cloth, or something of that kind?

A. No. It is not court-plaster. It is a rubber preparation that is put on a cloth, I could show you a piece of it.

Q. I want the jury to understand just what it is.

A. Yes.

Q. Isn't it true that that adhesive plaster that you speak of there is very easily pulled right off of the skin?

A. Well, you can pull it off, but it hurts just a little. It smarts when it comes off. It adheres quite strongly, and it always leaves a deposit of rubber on there when it is taken off.

Q. But that is off to one side. Do you say chloroform has to be used to take that rubber off?

A. To remove that rubber that adheres to the skin.

Q. That rubber that adheres to the skin wasn't on the wound; it was off to one side on the skin.

A. It was where the bandage had been fastened around the wound.

Q. The wound was protected from this adhesive plaster.

A. The wound is protected from that adhesive plaster. An *aseptic* dressing has to be put on there to keep any poison or dirt from getting in there. The doctor wouldn't dare to put that adhesive next to it.

Q. This adhesive rubber that stuck to the skin was entirely away from the wound?

A. It was not on the wound.

Q. It was entirely away from the wound? [221—  
174]

(Testimony of Mrs. M. F. Hall.)

A. It was on the neck all around the wound, but not right straight on the wound.

Q. It was not on the wound?

A. Not directly on the wound, because that was protected by dressing.

Q. Did you say or did I understand you to say that the doctor always uses chloroform to remove that adhesive rubber that is left on the skin there?

A. After he takes this adhesive bandage off?

Q. Yes.

A. He always has every time I saw him. I never saw him use anything else.

Q. Did you ever use any of that adhesive plaster on yourself?     A. Many times.

Q. When you take it off, would you take chloroform to take it off?

A. We always do. I had a sore finger the other day, and the day I took the adhesive off I took chloroform to take it off.

Q. Did you ever use pure alcohol on that?

A. No.

Q. Do you know whether pure alcohol will take that off?

A. No, I don't. The only thing I know about it is what I have seen doctor take it off with.

Q. As a matter of fact isn't it true that the last time that that wound was treated, or this eventful Friday the 24th of September, that there was not any bandage at all put on that wound except a handkerchief around it?

A. I told you that on the 21st of September, on



(Testimony of Mrs. M. F. Hall.)

Monday, I was present when doctor made that dressing, and he put a small dressing on there and he put a small piece of adhesive over that dressing to hold it on. I told you that before. [222—175]

Q. You are sure of that?

A. I am sure of that because I was there and assisted, and then the handkerchief was placed on the outside of that.

Q. And the matter is so distinct in your mind—it was a matter that appealed to your mind in such a way that you have no doubt but what that is true; that there was adhesive plaster put on there on the 21st day of September, 1914.

A. I will tell you how I know it. Of course, this note was given to me on Tuesday, and this was just one week before, and naturally I was certainly vitally interested in all that had happened, and I certainly remembered at that time. That is why it is so clear in my memory, because I knew at that time what had happened, and after I talked to Mrs. Lappi I came home and talked to the doctor and he explained to me exactly what had happened.

Q. I didn't ask you anything about what you told the doctor or what the doctor told you.

A. I was going to—(interrupted).

Q. I am not asking you about that. You state that you know positively, and that ends that subject.

A. Yes, sir. I was just going to—(interrupted).

Q. Now, while you were out at Mrs. Lappi's house there, you stated that Mrs. Lappi told you that she had heard rumors about Doctor Hall.

(Testimony of Mrs. M. F. Hall.)

A. I did not state that. I said that Mrs. Lappi had heard rumors about other little children. She didn't tell me anything about Doctor Hall.

Q. What did she say about these rumors about other little children? A. That is all she said.

Q. She didn't connect Doctor Hall with these rumors about other little children? [223—176]

A. I will tell you. She said the child came home looking red in the face and nervous, and she said, "I had heard rumors about other little children, and I was very much frightened, so I commenced to question the child."

Q. She didn't say that these rumors, or didn't intimate to you that these rumors about other little children were in connection with Doctor Hall.

A. No, sir.

Mr. ROTH.—That is all.

Mr. MARQUAM.—That is all.

(10 minute recess; trial resumed after recess; defendant and jury present.)

**[Testimony of M. F. Hall, for Defendant.]**

M. F. HALL, defendant, a witness in his own behalf, after being first duly sworn, testified as follows:

Direct examination.

(By Mr. MARQUAM.)

Q. You are the defendant in this case.

A. I am.

Q. You are a practising physician, and have practiced in the town or Fairbanks for some time.

A. I have.

(Testimony of M. F. Hall.)

Q. How long have you been practicing medicine and surgery?

A. Since March 11, 1889, 26 years last March.

Q. Where were you born?

A. In the State of Maine.

Q. Where did you receive your medical education?

A. New York City, Bellevue Hospital Medical College.

Q. Are you a graduate from that college?

A. I am. [224—177]

Q. Where have you practiced?

A. I practiced nine years in Revere, a suburb of Boston; five or six years in Skaguay; and the balance of the time in Fairbanks since 1903.

Q. When did you first come to Fairbanks?

A. In August, 1903.

Q. And you have resided here continuously since?

A. With the exception of one winter I spent outside in New York State.

Q. Are you acquainted with Mrs. Lappi?

A. I am.

Q. And the child Selma Lappi? A. Yes.

Q. When did you first become acquainted with Mrs. Lappi?

A. On the first visit of Mrs. Lappi to my office. That was in March, I think about the 27th of March. (Examines small book.)

Q. What was the occasion of her coming to your office?

A. She came to consult me in regard to a condi-



(Testimony of M. F. Hall.)

tion of Selma's neck.

Q. As I understand you, you had not known Mrs. Lappi before.

A. I may have seen her, but didn't know her.

Q. And you have never had occasion to see the child and know her before.      A. No.

Q. What was the condition that you found upon examination?

A. There were some enlarged glands, some four or five enlarged glands under the ear and under the jaw bone on the left hand side of the neck, the cervical glands.

Q. Were they enlarged at that time?

A. Somewhat.

Q. What did you advise at that time? [225—178]

A. I told her that one of them should be removed right away, because it would probably break down and form an abcess and affect the others. If it was removed that the others would probably disappear in a very short time.

Q. Was there any arrangement or talk about charges or fees at that time?

A. There was no arrangement, but she wanted to know what it would cost and I told her it would cost a hundred and twenty-five dollars; that it would be one hundred dollars if it could be done without an anesthetic; but if it was necessary to use anesthesia, not local anesthesia, that the bill would be one hundred and twenty-five dollars.

Q. What was done at that time, if anything?

(Testimony of M. F. Hall.)

A. She said she would come back in about a week and let me know.

Q. Did she come back?

A. She didn't come back again until the 8th or 9th of May, I think it was. (Examines book.) Yes, the 8th of May; the 27th of March, and then she came back the 8th of May.

Q. What was done at that time?

A. I examined it again and found that that particular gland which was diseased was rapidly getting very much worse and softening up and the tissues were breaking down inside and pus forming.

Q. What was done as a result of the consultation or examination at that time?

A. I recommended immediate operation then, and she said she would do it. She said she would have it done right away.

Q. Was that about the substance of the conversation at that time? A. Yes. [226—179]

Q. When did you next see Mrs. Lappi or the child?

A. That was the 8th of May, and I didn't see her again until the 2d day of July.

Q. Where? A. On Fairbanks Creek.

Q. How did you happen to see them on Fairbanks Creek?

A. I was called out there to see a man who had been injured on the lower end of Fairbanks Creek, and on my way back with the auto when somewhere 11 or 12, I was coming back in the auto, and Mr. Lappi came up to the road and stopped us and said he would like to have me come down and see the little girl.

(Testimony of M. F. Hall.)

Q. Did you go down?      A. I did.

Q. What condition did you find then—(interrupted).

A. I found—(interrupted).

Q. —in comparison to the condition you had found upon your previous examination.

A. This gland at the time of the first examination was about the size I judge of a pigeon egg, and when I found it this time it was swollen, puffed away out and it was soft and showed a large quantity of pus in there at that time. It must have been nearly the size of a small orange.

Q. Was the child suffering at that time from it?

A. Yes, and she was becoming very much emaciated and very thin; her cheeks were sunken and her eyes hollow and peaked.

Q. Would that be the natural result of her condition from that condition?

A. It would be the result of the absorption of this pus, and a septic condition,—blood poison. [227—180]

Q. Was anything done at that time?

A. Nothing. I suggested at that time that they come to town as soon as they could get the child in, and they said they would be in the next day, but I didn't see them again until about the twenty—(interrupted).

Q. Have you any data to refresh your memory as to the exact date; if so, give us the exact date.

A. On the 23d or 24th of July. (Examines book.)



(Testimony of M. F. Hall.)

And on the 25th of July the girl was taken to the hospital.

Q. St. Joseph's?

A. St. Joseph's Hospital. And her neck was lanced by the use of local anesthesia.

Q. How did you come to operate in that way?

A. I wanted to open it up more thoroughly and use general anesthesia—use chloroform—but the mother objected to it; she said she didn't want her child chloroformed, or put to sleep as she expressed it, and Mr. Nordale was there and we talked it over and finally I told them I would introduce some cocaine under the skin and I would lance it and let out the pus, and that would give the child a chance to build up a little bit until we saw how the thing acted.

Q. Describe to the jury the condition that was there when you lanced this gland or the neck. If there was any pus, describe that.

A. Yes, there was quite considerable pus.

Q. About how much?

A. I should think there was altogether half a tea-cupful of pus that came up when I made this incision. The incision was a very short one, just under the skin; the *think* having bulged out and stretched out until there was not very much except the skin and the tissues close to the skin between [228—181] the pus and the outside.

Q. Was that about the extent of the operation or the treatment at that time?

A. Well, I washed it out, syringed it out and introduced some drainage so that the wound where the

(Testimony of M. F. Hall.)

incision had been made wouldn't close up until after it was drained.

Q. Then did she remain in the hospital?

A. She remained there for a few days after that. (Reads from book.) On the 26th and 27th of July dressings were made at the hospital, drainage was taken out and fresh drainage introduced. After that she came to the office on the 28th, 29th, 30th and 31st of July, and daily treatments were made; and during August, from August 1 to 12th she made daily visits to the office.

Q. From what date?

A. August 1 to 12th inclusive. August 13th she didn't appear at the office. On August 14th I learned that she was at Mrs. Nordale's and had a cold, and Mrs. Nordale asked me to go up there, and I went up there and dressed it. During this time the wound was closing up very rapidly on the outside, leaving quite a large cavity inside, so it was impossible to keep it drained, and I wanted to open it more thoroughly, and I had sent to her mother repeatedly on the creeks and to her father that they should come in and consider the matter of having it opened up and cure her instead of leaving her in this unfortunate condition, and after three days—this was in August, and on the 15th to the 18th she came to the office, after I went to Nordale's, and I don't remember the day they came in, but on the 19th it was agreed that she should go to the hospital and take [229—182] an anesthetic and have this thing opened up. The

(Testimony of M. F. Hall.)

father and the mother and the nurse at the hospital were present, and the mother had to be put out of the room so as not to interfere because she was very nervous.

Q. She was very nervous?      A. Yes.

Q. Well, that operation was performed, and the child was put under the influence of chloroform at the hospital and the operation performed, and how long did you treat the child in the hospital?

A. At that time three days. Then she went home with her mother. From the 20th to the 23d she was in the hospital. On the 24th, 25th, and 26th, she came to the office with her mother. Then her mother went out to the creeks to make arrangements to come in and stay; and from the 27th to the 31st of August she left her over at the hospital for the Sisters to look after, and I made regular visits over there. I did my dressings over there. Then from September 1st to September 15th she made daily visits to the office, sometimes with her mother, sometimes with her brother. During the time that the mother was away in the first part of August, the first seventeen or eighteen days, Anita Nordale came to the office with her every time. Then after the 15th the wound was nearly healed, nearly closed up, and she didn't come again until the 19th. The 19th was on Saturday, and I told her to come on Monday the 21st.

Q. That is of August?

A. In September. And then, on the 21st of September I told her to come again on Friday and that



(Testimony of M. F. Hall.)

would probably be the last visit that would be necessary; and she came on those dates, and there were two or three times—I couldn't be [230—183] exact about that—two or three times she came alone. On the 24th she came to the office alone.

Q. During this period you have covered from the time that the child first came to the office, state to the jury what the circumstances were with regard to Mrs. Hall being at the office generally during that period of time? A. From what time?

Q. From the time that the child—well, just state generally during what period of time, if there was any especially, that Mrs. Hall was about your office, and why that was?

A. From the time that—(interrupted).

Q. When were you married? A. March 7, 1914.

Q. Just go ahead and state what the circumstances were at any period of time during that time of Mrs. Hall being around your office more than usual.

A. Sometime in the early summer—I could refer to it very readily if it is necessary—the colored girl Geewatha Brice left and went outside. She went outside with her mother who was taken outside as an insane patient, and up to a few days before that she had been in the office for over a year— a year and a half. When she went away, Mrs. Hall came down in the afternoons, and occasionally in the forenoons, to straighten up things there a little bit, but she spent all of her afternoons there to be there to assist me and to entertain patients who were there

(Testimony of M. F. Hall.)

waiting and to tell them what time I would return in case I should be absent in the afternoon; and from that time on she was almost always there in the afternoon; and from the time we moved out of the Jesson house, between that time and the time we moved into our present residence, while we were [231—184] living in a tent and at the Nordale Hotel, she was there all day long, that is, after 8 or 9 or 10 o'clock, after she had gotten through breakfast.

Q. That was while your house was being remodeled.      A. Yes.

Q. I wish you would describe especially to the jury, after the operation had been performed and during the time that the child came to your office for the purpose of receiving treatment and dressing, just what you did and the method of doing it.

A. Well, the first process would be the removal of the gauze which had been packed inside of the wound, which was filled with gauze for drainage practically to the bottom so as to allow it to heal from the bottom out, keep the edges apart so that it would not close and shut in some of the diseased tissues. The first step was to remove this dressing.

Q. That had been placed there after the operation?

A. That had been placed there at the previous dressing. Then the wound was sponged out with some antiseptic or aseptie preparation, and re-filled with another piece of gauze for packing and drainage. Then a dressing placed over that of antiseptic gauze



(Testimony of M. F. Hall.)

again, and over that a piece of cotton; over that a piece of oilsilk, then more cotton—the oilsilk to keep it moist—a little cotton, and then bandages, the ordinary gauze bandage around the neck and over the head so as to hold this firmly in place so that it would not irritate. That was the method of dressing I used when there was any discharge.

Q. Explain why it was necessary to keep the wound open and use this gauze for the purpose so as not to allow it to heal up. [232—185]

A. So that the granulation would occur from the bottom, and when it was healed up level with the surface, to allow the skin to grow over it, because if the two edges were allowed to come together and let it heal together, it would never heal from the bottom and leave the wound open as a fistula.

Q. Altogether how many treatments did you give to the child? A. Fifty-six.

Q. How many of those treatments were made at your office, if you remember?

A. I can tell you. I made a memorandum of the number of times here.

Q. Have you the memorandum there?

A. Yes, I have it right here. (Produces memo.) There were two visits Mrs. Lappi made to the office with her child, March 7th and 8th. Then there were fifty-six; one operation local anesthesia at the hospital, and one operation with general anesthesia, —putting the child to sleep with chloroform, and fifty-four dressings independent of those four times.

Q. How many of the fifty-four dressings, outside



(Testimony of M. F. Hall.)

of the operation, took place at the office?

A. There were forty-one.

Q. Forty-one at the office?      A. Yes.

Q. You have described, as I take it, the treatment that you gave the child and the manner of dressing, shortly after the operation was performed, and in tying it up—tying the head up as you have described. Now, just go ahead and if there was any change in the method of dressing the wound or of holding the dressings in place, describe it to the jury or explain how it was.

A. This method of treatment was continued as long as there was [233—186] any sloughing or any discharge from the wound. As soon as the wound became clean and clear of any discharge and had commenced to granulate—all the surface, the bottom and the sides, had commenced to granulate well, then a dressing was placed in there—a gauze dressing was placed in the wound to prevent the edges from closing and to allow it to fill up, and more gauze placed over the outside, and not necessary to place on so much cotton and make such a big dressing to absorb and take up the discharge from the wound, I put some adhesive plaster, fastened it and held the dressing in place by adhesive plaster, and part of the time—another reason for doing that was in order to keep the dressing from rubbing and irritating the tender wound.

Q. Is that the proper and common way of dressing such a wound?

A. It is the best thing to use so that the dressing

(Testimony of M. F. Hall.)

will not irritate the wound by friction.

Q. In a dressing of that kind, using a little tape, is it necessary to remove the tape from time to time?

A. It should be done occasionally.

Q. Was it necessary, and did you, in making these dressings of the child, Selma Lappi, remove the tape that you had placed there?

A. After I commenced using that, about every third or fourth or fifth time I had to remove it.

Q. Describe to the jury how you removed the tape from the neck.

A. The first time when I put it on when it was fresh and new the piece was white and apt to fill in the whole angle of the jaw here and cover up the dressing. And the next dressing after fresh adhesive had been put on, this piece of adhesive was split,—cut crosswise,—so that the two edges of it could be turned back and exposed to view the [234—187] wound, and it was treated through that, and then soft cotton put over there; then the two laps—of the dressing you might say—of the adhesive were brought together again, and some little strips of adhesive put back across. The next subsequent dressing would consist merely of peeling off these pieces that were sticking to the first adhesive,—not to the skin,—peeling those off because it was painless, and laying it open; dressing it again, and putting on some others. But in all cases where the dressings are exposed to view, and around the edges, as a result of warmth and perspiration, the adhesive becomes—the rubber gets out from under the adhesive



(Testimony of M. F. Hall.)

and becomes black and dirty and disfiguring, and it is always customary to remove the adhesive—the bottom *lair*—and put on a fresh one; also in order to be sure that there is nothing underneath the thing which might cause any slight infection, any slight or little pimples or sores.

Q. Describe to the jury the method of removal of that adhesive.

A. I usually use a little chloroform on a dropper. I lift up one edge of the adhesive and drop it in the edge. As you drop it in the edge, immediately, instantaneously it softens up this rubber so that it peels right off as you come back. But around the edges of the adhesive where the adhesive has been there is almost always, when it has been on any considerable length of time, or on places where there is perspiration, or it gets soiled, the rubber turns black, and there some of the rubber has remained, and it is necessary to remove that thoroughly, and also where it has been adherent to the hair.

Q. Is there any resemblance between a piece of adhesive tape when it is placed upon the skin and removed, and a porous [235—188] plaster which everybody knows about, about it's sticking to the skin? Is there any resemblance?

A. Quite a bit, but not in the composition. But as far as the adhesiveness is concerned, this—(interrupted).

Q. Is there anything else besides chloroform that can be used to remove stuff of that kind?



(Testimony of M. F. Hall.)

A. Yes, sir, ether. Some use ether and some use chloroform.

Q. How about alcohol. Describe what effect alcohol will have, and how you have to use it in order to remove it.

A. Alcohol dissolves the rubber very slowly and requires a good deal of friction—you have to rub it pretty hard to start it with the alcohol, and, if the skin is very, very tender, it causes suffering. And particularly with the hair, the adhesive rubber which is left there, with the alcohol will dissolve the thinner layers of it and roll it up in a little ball, and it is sticky and hard to get off with the alcohol. You can get it off if you stay with the alcohol long enough.

Q. Do physicians, in removing adhesive from a wound, ever use alcohol in removing it?

A. Adhesive never comes in contact with the wound.

Q. But around it. Do they ever use alcohol?

A. For what purpose?

Q. To remove the remains of this adhesive.

A. I don't know any that do. I have tried it but it is not satisfactory.

Q. You say it requires rubbing to remove it.

A. Yes, quite a good deal of rubbing.

(Here the Court takes a recess until 2 P. M. to-day, and the jury retire in charge of the bailiffs, after being admonished not to talk about the case, etc.) [236—189]

(Testimony of M. F. Hall.)

April 21, 1915, 2 P. M.

Defendant and jury present. Trial resumed.

M. F. HALL, resumes his testimony on direct examination.

(By Mr. MARQUAM.)

Q. When you stopped before noon I was asking you about the method of removing this tape that held the dressing, and I was asking you something about the use of alcohol, and I don't know whether you had concluded what you had to say about that. But explain in your own way and make it clear to the jury, what you use, why you use it, and why you didn't use something else.

Mr. ROTH.—I think he has already gone into that fully.

The COURT.—He may answer the question.

A. What is the question?

(Mr. MARQUAM.)

Q. I was asking you at the time you concluded your examination before dinner why you used chloroform to remove these pieces of adhesive tape or what remained after the tape was taken off, and there was some question asked you about whether alcohol could be used to remove that. I don't know whether you answered it or not, but explain now why you used chloroform and why you didn't use anything else.

A. I think I started to say in regard to the use of alcohol that while alcohol will dissolve the rubber and remove it, it requires a great deal more friction.

(Testimony of M. F. Hall.)

Q. In removing it in cases where there is a wound which is healing, is it advisable to use alcohol for that purpose ever?

A. I wouldn't say that it is not advisable ever, but in this particular case, and in most cases, on account of the extra amount of friction that is required it is liable to [237—190] irritate the skin. The skin is naturally tender anyway on account of having the adhesive on there several days. It naturally is tender. And the removal of it off the superficial skin called the epidermis, the outer skin, the false skin, leaves it very tender, and what is left there of this adhesive rubber, the friction of hard rubbing required by the alcohol is liable to produce irritation; and any irritation near the wound is a thing to be very much guarded against and avoided.

Q. What is claimed of chloroform?

A. By the use of chloroform, just a slight touch of it, just the slightest touch, no rubbing at all, just a little bit of chloroform, a few drops on cotton rubber over lightly, and it disappears like magic. Ether is sometimes employed, but it does not dissolve it as quickly as the alcohol.

Q. As what?

A. As the chloroform. But it is a matter of choice. Some physicians use ether and some use chloroform.

Q. Is there any marked difference in the effect? I don't mean as far as the removal of the rubber is concerned, but as to the effect.

A. They both are anesthetics. Both have a ten-



(Testimony of M. F. Hall.)

dency, if enough is inhaled, to produce unconsciousness and anesthesia.

Q. Does the use of chloroform or ether in the way you have described have a tendency to produce that result?     A. No, sir.

Q. In your experience as a physician and surgeon, do you know of anything else that is ever used by surgeons for the purpose you have described besides ether or chloroform?

A. No, I have tried other things, but I don't know of anything that is.     [238—191]

Q. I am talking about the practice of surgeons generally. What do they generally use?

A. They use chloroform or ether almost exclusively.

Q. How many times during the fifty odd times or visits of this child to your office or at the hospital, outside of the time that you gave chloroform as an anesthetic, have you had occasion to use chloroform in connection with the removal of this tape?

A. Five or six times.

Q. I wish you would describe to the jury what was the effect, or how the child acted, upon these occasions when chloroform was used for the purpose which you have described.

A. When I used chloroform I took the chloroform bottle and put it up against the cotton, just a few drops on it, and the first one or two times as soon as she got the least smell of it, just the odor of it, whether it was very close to her face or a little ways off—it is very volatile and the odor travels rapidly—and if she got the least bit of that odor, she began to

(Testimony of M. F. Hall.)

feel afraid that we were going to put her to sleep.

Q. How did she act?

A. She put one hand over her mouth and the other hand pinched her nose together and held her breath, so that she would not get any of the odor of it; sometimes—

Q. Was that in every case, or occasion?

A. Every time that I used it.

Q. Was there anything else that she did at any time? I wish you would go ahead and describe in your own way, without waiting for each specific question, but describe so that the jury will understand, her whole actions on these different occasions, so as to give them a general idea of it. [239—192]

A. Sometimes that was all that she would do. She would just simply hold her breath with one hand over her mouth and the other hand over her nose, and she would try to hold her head away a little bit; and I would have Mrs. Hall, or whoever was there—one day her father was there and I had him assist, until after I had just rubbed this thing across there—it only took just a very few seconds, and that was all. And other times she was particularly nervous, she would, as I say, put her hand over her mouth and the other hand or fingers pinch her nostrils, and she would stiffen herself up as rigidly as she could, try to resist it, try to keep from getting the odor of it as she explained; and on two or three occasions she just threw herself right back on the table, and when she would do that I would just go ahead and do that right quickly and fix my dressing and put my hand under



(Testimony of M. F. Hall.)

her and raise her up, sit her up and finish up the dressing.

Q. Were there any other manifestations on the part of the girl at any other time different from or in addition to what you have already stated?

A. Once or twice she cried, and on one particular occasion when I picked up the bottle and commenced to get ready, she put both hands over her mouth and over her nose, and when I came towards her with it she stiffened herself up and acted in a hysterical manner, if you understand what hysterics is, and as I came towards her with it and put my hand up ready to put it on, I said, "You must be a good girl and let me put it on. It will only take a second, and I won't hurt you." And she said, "Don't spank me. Don't hurt me and do that any more. I will be good. I will be good. Don't spank me any more." I hadn't touched her at [240—193] that time except to put her on the table. I hadn't made any application of the chloroform at that time. And I laid it down and put my arms around her and tried to soothe her and quiet her, and told her that she must be a good little girl, and while I was talking with her I reached around and got hold of a piece of cotton and I said, "I will take this piece of dry cotton and rub this off." and I started to rub it off, and she got a little whiff of it just as I got through and put her hands over her face again, and I walked away from her and she looked around and saw it was all over.

Q. After one of these occasions when chloroform was used, describe to the jury what would be her appearance as far as being calm or flustrated, or red in



(Testimony of M. F. Hall.)

the face? A. She was a very, very nervous child at all times, very nervous, and after her dressings, even when they were the smaller ones, when chloroform was not used at all, but just the removal of the dressings from the wound and replacing them by putting in new ones, she was always very nervous and didn't like the dressings, tried to resist them as much as she could, and always became very, nervous and very red in the face, and often times when nothing was done at all, just when she first came in and when I started to talk with her, she would flush up.

Q. During the course of treatment that the child received, were you watching and observing her weight as to whether or not she was losing or gaining in weight? Describe to the jury what you did in that particular in the way of weighing her or anything of that kind, and why you were doing it.

A. The first time she came to the office after the operation, this is after the operation at the hospital, which was two [241—194] or three days later, I thought it would be necessary to notice the improvement as a result of the operation, and I took her into the next room—there was a vacant room there that I had previously occupied and moved out of, and, having no room for my scales in my office I had left them in that room, so I have for the last year took my patients in that room and weighed them in there—and I took her in there with her little brother and weighed her, and every three or four days, or four or five days, I would take her and whoever happened to come there with her and take them in there and weigh them, and I suspected that this trouble that

(Testimony of M. F. Hall.)

she had might be of a tuberculous origin as it had all the appearance of it, and I was anxious to find out how much she increased in weight, because that would be one of the guides, one of the things that would help my conclusions as to whether or not it was tuberculous or simply due to injury or some other cause; so I weighed her very frequently.

Q. What was the result of your observations in that particular as far as her gaining in weight or losing in weight?

A. A very marked improvement in her weight. She gained I think in the first ten days a pound and three-quarters, and the first twenty days she gained over three pounds in weight.

Q. I understood you to say in your direct examination this morning that along about the 21st of September she was there upon one occasion for treatment and that you had given her some directions about a certain time to come back. Do you remember when that was, and what were the circumstances in connection with it? [242—195]

A. On the 21st day of September, after I had finished my dressing, I told her to come back on the following Thursday. Previous to that she had come the Saturday before, skipping Sunday. I had no patients on Sunday that day, and I had her skip that day, and three or four days before that she had skipped. Monday I told her to come Thursday and that would probably be the last time; that it would be necessary for her to come because the wound was nearly all healed—one little tiny spot where the skin had not quite covered over, and I put a little dressing on that



(Testimony of M. F. Hall.)

and a little piece of adhesive over that, and a handkerchief outside of that.

Q. Was the course of treatment which you administered to the child successful?      A. Yes.

Q. The child was cured?

A. No, I wouldn't say that. It was successful as far as I was allowed to go. I wasn't allowed to treat the case as thoroughly as I desired to go.

Q. What do you mean by that; that you were not allowed to?

A. Because the mother would not permit me. From time to time—In the first place, she would not permit the early operation which would have prevented any continued treatment. That particular gland which was diseased, and three or four others which broke down as a result of delay, following the operation they were thoroughly cured and thoroughly cleared up. There were still some other glands in there which I feared might break down, and I felt as though if it was a child of mine I would want them removed as a matter of safety.

Q. Was there any special time during the day during all this [243—196] period of time which was common to all these appointments that you made for her, and was there any reason for making any particular time of day?

A. My office hours were from 3 o'clock in the afternoon until 6. Those are the only office hours which I have. Those are the hours I always plan to be there, unless there is some exception; so I always planned to have her come immediately from school as it seemed to be a convenient time for her to come.



(Testimony of M. F. Hall.)

Q. What time did she usually come?

A. It averaged anywhere from 3 o'clock to a quarter to 4.

Q. How long a time on each occasion would she be at your office?

A. That varied. During the earlier dressings it was necessary for her to be there sometimes from half to three-quarters of an hour because the wound was very tender and sensitive and I had to be very patient with her and fuss along, and sometimes it would take a long time before I got through.

Q. Later on would the time shorten?

A. Yes,

Q. As a result of your directions, did the child come to your office on Thursday the 24th of September? A. She did.

Q. What time of day did she come there, do you remember?

A. It was between—I judge it was between—pretty close to 3 o'clock.

Q. Do you remember who was there, if anyone, besides yourself?

A. There was no one there. I think I arrived at the office before she did, and she came very soon afterwards. [244—197]

Q. From the time she arrived at the office and you started in to give her the regular treatment, describe to the jury just what you did upon that occasion.

A. Well, when she first came in I asked her to sit down for a few minutes, take off her coat, and she took off her coat and sat down for a few minutes,

(Testimony of M. F. Hall.)

and I sat down to my desk and attended to some writings and memoranda that I wanted to make, and while I was doing this Mr. Dundon came to the door, he and another plumber who were busy in the next room doing some plumbing work and repair work, and he come to the door, and the door wasn't quite closed,—it was open probably an inch or two inches,—knocked on the door, and I told him to come in, and he stepped in and said, “I hope I am not disturbing you.” I said, “No, not at all. While you are working just come in and go just as you please. You need not knock at all.”

Q. What was he doing? What was the occasion of his being in your office?

A. He was doing some plumbing. There were some valves in my room that had to be opened and closed to control the steam supply to the pipes he was working on in the other room. Then after he went out I took Selma up and set her on the end of the table the same as I had always done, and took off the handkerchief and moistened this piece of adhesive, softened it up enough so it peeled off, and removed the little particles of gauze which remained there which was adherent to the wound or what had been the wound.

Q. Describe to the jury what there was on the child at that time with regard to this adhesive tape, and when you had put that on.

A. I put that adhesive tape on the Monday previous. And on [245—198] Monday previous to this time the wound, which had been quite a long incision—an inch and a half or more and very deep—



(Testimony of M. F. Hall.)

had all healed up with the exception of a little tiny spot in the center, perhaps as large as the head of a pin; it might be a slight trifle larger, and over this I had put on a little iodoform gauze and a little piece of cotton to protect it, and over that I had put a small round piece of adhesive, just to cover that up and protect it from injury, and for the good looks of the thing. I had been accustomed to fasten a handkerchief around her neck. Before that I had been putting bandages around, and I suggested to her mother that a handkerchief would be easier for her to use because she could change it and put a clean one on.

Q. That dressing, as you had placed it on there, was on there when she came?

A. It was. I moistened that little piece of adhesive and it peeled off. I removed my dressings which were underneath, and around the edges of where this adhesive plaster had been struck, which had been on there for four days, it left a black ring or rim, a black mark where the rubber had become soiled from perspiration or dirt or whatever it was, and I took my piece of cotton and rubbed that off, and then I rubbed it over the entire wound because it was entirely healed over.

Q. What occurred when you did that?

A. When I did that, when I started to do that, she put her hands over her face, one hand over her mouth, and with the other hand she pinched her nose and tried to hold her breath, and stiffened herself up and threw herself back on the table, and she made this remark, she said: "You [246—199] shouldn't do that. It is not right to do that. I don't want



(Testimony of M. F. Hall.)

you to do that," and kind of in a very low tone and under her breath; and when she fell over backwards; there is a pillow lying on the operating-table, and she held herself in that position, and I just took that little cotton and sponged this stuff off, and that was all that there was to do. So I told her to get up. She didn't make any movement to arise, so I put my arm under her neck and my hand on her stomach like this (showing) and straightened her up. First I tried to life her up, and she wouldn't rise, and then I put my hand on her stomach, and I don't think the child thought I was through with my dressing, and she was just holding herself just like that, just rigid.

Q. When you set her up on the table, what was her appearance at that time?

A. The same as it had been on previous occasions.

Q. What was it?

A. She dropped her hands down away from her face, and looked up at me and acted as though she was frightened, the same as she had before, and nervous, a little bit shakey, and she was red in the face, the same as she always was on those occasions.

Q. After that, what did you do?

A. I put my arms around her and petted her and soothed her, the same as I would any child, and I picked her up in my arms and went over and sat down on the couch with her and held her on my lap for some three or four minutes and tried to talk with her, and asked her if she was frightened, and she said, "Not very much now." I said, "You look as though you didn't feel good. Do you feel bad any-

(Testimony of M. F. Hall.)

where?" She said, "Yes, I feel bad here," and put her hand on her side. [247—200] I said, "Does it hurt you there in your stomach?" She said, "Yes." And I put my hand down and commenced to rub her around on her little abdomen, around on the outside like this (showing), I asked her if it still hurt, and she said, "Yes." Then I put my hand under her clothes and slipped it in the little place—the child's drawers are buttoned on the side, so there was a split down on the side of them. Those who have children—(interrupted).

Q. Describe it.

A. So that one button, the button of the flap which runs around behind, buttons on the same button that the flap of the front buttons on, so that in case a child needs to let their drawers down, they unbutton these two buttons and the back part drops down. There was a slit here the same as in a little boy's trousers where they button on the side. I put my hand in through there and rubbed the child and massaged her on the abdomen the same as we are warranted in doing, and the same as I would want any physician to do with my child, or any other child, under similar circumstances where she complained of distress.

Q. I will ask you to state if at that time you said to her that you wanted to see how fat she was, or whether she had gained any weight?

A. No, I made the remark to her, while I had my hand there, I said: "My, you are getting to be a fat little girl. You are just picking up. You are getting fat right fast." And how pleased I was to think that she was improving. In fact, I had re-



(Testimony of M. F. Hall.)

marked that to her a good many times.

Q. I will ask you if at that time, or at any time while you held the child in your lap, or at any time that she was [248—201] in your office, you placed your hand on any part of her person under her clothes, except as you have described.

A. No, not that I know of, unless I touched some part of her body in passing, that I don't know of. I never intentionally touched her any place. I might have put my hands on her limbs. I won't say positively that in putting my hand in here, I didn't touch her limbs anywhere or any place, and in putting my hand up under her dress I won't say positively that that I touched her limbs; but I did not put my hands on her privates, or touch them.

Q. Have you, at any time, in regard to Selma Lappi ever placed your hands upon any of her private parts?

A. I never did. I never had any thought of such a thing, or desire.

Q. I will ask you, Doctor, if it is true that at that particular time, or at any other time, you kissed this child upon the leg or near the knee, or upon the cheek?

A. No.

Q. Is that statement true or otherwise?

A. I never kissed her on the knee and I never kissed her on the face. I put my arms around her like this many times when she was nervous and petted her and held her close to me, and put my face close to her face and tried to soothe her and comfort her.

Q. You heard the child's testimony about her ly-



(Testimony of M. F. Hall.)

ing down on the couch and about you lying down on the couch. Tell the jury whether anything of that kind occurred?

A. No, The fact is this. My couch lies lengthways, the same as this place would be right here. The couch was lengthways [249—202] here in the corner of the room, and there are some five or six or seven pillows lying piled up, banked up, in the corner. When I took her from the table, which is on this side of the room (indicating), I went over with her to the couch and sat back on the corner of the couch the same as I am here, and just leaned up against those pillows which are in the corner—those soft cushions, and I did probably lean back about as much as I am now. That is my usual position when I—(interrupted).

Q. Were you sitting at your desk in the chair when you were holding this child on your lap or knee at any time? A. No.

Q. Did, at any time, the child lie down upon the couch in the way that she described it? A. No.

Q. You heard her testimony?

A. Yes. She never went out of my arms, as far as her relation to the couch is concerned, from the time I picked her up until—when I took my hand away from her abdomen I noticed that there was one button of her drawers that was unfastened and I told her to fasten that up and then sit down. But she never lay down on the couch at all. And the only time when she was sitting in my lap and I was leaning time that she and I were both on the couch was the

(Testimony of M. F. Hall.)

ing back against these pillows.

Q. How long did she remain there?

A. Altogether I should say she might have been in the office from the time when she first came, maybe twenty minutes.

Q. I refer particularly to the time that you held her on your lap. [250—203]

A. Just a few minutes, maybe four or five minutes. I couldn't say; there is no way of estimating that.

Q. Had this occurrence or a similar occurrence taken place before while she was there in your room, about you holding her on your lap?

A. I may have taken her on my lap, but never when there was no one else in the room, because that was the only time I was ever alone in the room with her when she was there.

Q. Had your wife been there on different occasions when this occurred?

A. Yes, she was there the majority of the time when Selma came there for her treatment.

Q. Do you remember on this particular occasion of any candy being given the child?

A. I am not positive, but it is quite probable. All the time Mrs. Hall was there she always had candy sitting on the table, and she frequently gave it to children. I may have given it. It is more than likely I did, if there was some there, but I don't remember that particular incident.

Q. As far as her appearance went; as far as the flushed condition of her face, or her face being red, or her being nervous, I will ask you to state if there

(Testimony of M. F. Hall.)

was any difference in her appearance on this particular, at this particular, time than any other time when you had occasion to use chloroform in the manner you have described.

A. No. no difference from any other time. Just changing the dressings on Selma caused her considerable distress—taking the dressings out and putting them back—and she was often hysterical, and did similarly when there was no chloroform used at all, just from the tenderness of the wound when the dressings were being made. [251—204]

Q. During the time that the child was at your office, do you remember how many times, or how long at any one time, or what the circumstances were, about this plumber, Mr. Dundon, coming into your office?

A. Yes. He came in twice. He came in the first time, as I stated, while I was making my memoranda and laying out my work for the afternoon.

Q. Where was the child then, do you remember?

A. I think she was sitting on the corner of the couch waiting for me to do the dressing.

Q. Do you remember of him coming in at a subsequent time that the child was there, and what she was doing, and what you were doing?

A. Yes. He came in again about 8 or 10 minutes after that, and the child was sitting on the couch, after the dressing, and it couldn't have been over 8 or 10 minutes while that little dressing was going on and I had her in my arms and was sitting on the couch.

Q. Was the door to your operating-room, or what-



(Testimony of M. F. Hall.)

ever you call it—consultation-room?

A. Consultation-room or dressing-room.

Q. The inner room?      A. Yes.

Q. Was that door locked at any time while the child was in there?

A. No. I am not sure it was closed, that is, not closed tight. It was closed part way to, or very nearly.

Q. I understood you to say that the plumber came there while the child was there?      A. Yes.

Q. And that he said something to you. [252—205]

A. He did.

Q. What was it he said?

A. The door was open then an inch or two, and he knocked on the door and he said, "I hope I am not bothering you." I said, "Not at all. Come in and go, just as you like. You won't bother me at all."

Q. Did you say anything to him about knocking, or not knocking?

A. Yes. I told him he needn't knock. I said, "You can come and go just as you like. You need not knock at all."

Q. At no time was the door of your room locked?

A. No, I don't think it was closed tight at all.

Q. Where was Mrs. Hall at that time, do you know?

A. Mrs. Hall and I had just had a little lunch out in our tent.

Q. Where was this tent that you refer to?

A. On the lot where we live now on the corner of 6th and Cushman.

Q. Were you sleeping there?

(Testimony of M. F. Hall.)

A. Sleeping there, but not eating there but very rarely. But we had some little delicacy and were having a little lunch that day there, and I told her I must be down at the office by 3 o'clock, and went away, and she said she would be down soon. She got things tidied up a little bit and she came down at half-past three.

Q. By the time she came down had the child left?

A. Yes, I think she had been gone some ten or fifteen minutes—ten minutes anyway.

Q. Was that the last time that the child was at your office?      A. It was.

Q. What was it that you told her about coming any more, if anything, or not coming any more? What was your directions?

A. After she went out of the room and started to go home, she[253—206] started to come back and she said, "When am I to come back again?" I said, "I don't know that it is necessary for you to come at all, Selma, but you drop in in a few days, maybe Saturday, Sunday or Monday, just drop up if you wish and let me take a look to see that everything is all right." I didn't put any dressings on at all, just fastened the handkerchief around her neck.

Q. Was that the first time she left the office without her neck having dressing on it?

A. Yes, the first time.

Q. She was not there Friday? It was not a Friday she was there the first time?

A. No. It was Thursday.

Q. Did you give her any directions or make an

(Testimony of M. F. Hall.)

appointment with her to be back Saturday?

A. No, no definite appointment. I told her—(interrupted).

Q. You just stated that. You need not repeat it.

A. Yes.

Q. How many times do you think, during the time you were treating the child, that she came to your office alone, or without her mother or brother or some other person?

A. Why, I imagine two or three times. I am not sure, because sometimes when she came and her brother came with her I didn't see him, and I couldn't tell whether he was there or not, but there would be a number of patients out in the other room, and I would just step to the door and Mrs. Hall would indicate, if she was there, whose turn it was, and I would tell the child to come in. Many times when the boy was there I didn't know about it.

Q. What proportion of the times that Mrs. Hall was there would [254—207] Mrs. Hall be in the operating-room during the time you were dressing the wounds?

A. She was there, I should imagine, about three-quarters of all the dressings, in and out. Sometimes she would come in and help me, if I would call her, I had a push button there, and I would press the button to have her come in and get something for me, or to hold Selma's head or hands. Shortly after the dressing was over—she had a dress that buttoned up in front and it was high and I had to have the buttons unfastened, and I would sometimes have to have



(Testimony of M. F. Hall.)

her dress unbuttoned behind, and I would call Mrs. Hall in to fix her up.

Q. After the Thursday, the 24th of September, did you see Mrs. Lappi after that, and if so, when did you first see her?

A. On the following Monday.

Q. About what time of day?

A. It was upon my return from the hospital. I couldn't say exactly, I imagine it was sometime between 11 and 12 o'clock, because that is the usual hour of getting back to the office in the forenoon.

Q. Just describe to the jury in your own way exactly what occurred when you saw Mrs. Lappi on this occasion.

A. I had my grip in my hand, and I opened the door and stepped into the office. I saw Mrs. Lappi sitting in the chair. I said, "Good morning, Mrs. Lappi," and she didn't say anything at all. And I stepped through into the next room and deposited my grip and my hat and coat, and came back again, and said, "It is a lovely day." But she didn't say anything at all.

Q. What was her appearance at that time?  
[255—208]

A. Her eyes were very snappy and she was white and looked as though she was pretty much excited about something or other. I didn't know what the trouble was.

Q. Tell what was said.

A. And the first that she said was, "What do you mean"? I said, "What do I mean? What do you

(Testimony of M. F. Hall.)

mean? I don't understand you." And then she said something to the effect of, "What do you mean by tackling young girls," something to that effect—I don't remember the exact words. I said, "Tackling young girls? I don't understand what you mean." *He* said, "Yes, you do. My child don't lie. My child came home and told me that you unbuttoned her little panties and kissed her on the bottom." I said, "Mrs. Lappi, I didn't do any such thing." She said, "Don't you tell me that. My child don't lie. I know that you did, and you are an old brute," and went on and talked fast, and began to talk so loud that I got up and walked over to the door and said, "Mrs. Lappi. Don't talk so loud. If you have any complaint against me to make, tell me what it is so that I can understand it. When did this happen? What do you mean?" She said, "The last time that the child was down here. My child don't lie." She kept repeating that—"She came home and told me that you unbuttoned her little panties and kissed her little bottom." I said, "Mrs. Lappi—(interrupted).

Q. What was her manner of talking at that time?

A. She was very much excited. She talked loud and shook her fist in my face, and I tried to get her to keep quiet, and tried to get an opportunity to get at what the trouble was, so that I could understand and have a talk with her about it. She said she would talk as loud as she wanted; she didn't care who heard what she had to say, and she was going [256—209] to tell everybody she knew all about it, and I said,



(Testimony of M. F. Hall.)

“Here, Mrs. Lappi, I am not going to stand for such talk as this, or any such language to me; it is not fair, and we are not both of us going to stay in this room. If there is going to be any more talk, you will have to talk less, or we will have to have a witness here. You go over and get Mr. Crossley and bring him over here, or anybody else, and we will talk this over, and you can tell what you have to say and I can tell what I have to say. If you don’t want to do that—” I am saying this as I said it, in a very connected way now, but I had very much difficulty in saying it in one sentence, as she was constantly interrupting me—I said, “If you want me to, I will go over with you.” She said, “I don’t care anything about Mr. Crossley. I don’t want Mr. Crossley. I am going to punish you. I will fix you plenty.” And I stepped out in the hall then to get away from her and was going downstairs to leave her there to talk to herself. When I stepped out into the hallway, she followed me out and said, “If ever you speak—” something to that effect—“If ever you speak to either one of my children again, I am going to shoot you. My husband paid you sixty dollars, and you will never get another red cent out of us. And don’t you send us any bill.” And the last thing then, I turned around and started back to the office from the head of the stairs, and she went down the stairs making some more remarks about me tackling little innocent girls, a man of my age tackling these little innocent girls when there were plenty of women who could be tackled, or something to that effect—I can’t re-



(Testimony of M. F. Hall.)

member the exact words. That is the last time I ever talked with her. [257—210]

Q. Were you able at that time, doctor, to talk with her, or would she listen to anything that you had to say? A. No.

Q. —in the way of what had occurred at the office, after your attention was drawn to the time that she referred to?

A. No. I had no opportunity whatever of telling her anything of what had occurred. I had difficulty in making anything out of what she said. I went back to my room and I was just dumfounded. I didn't know what she was driving at at all. I never dreamed of anything of the kind. I didn't know whether she was trying to get ready to make an excuse for not paying her bill, or whether she had some other scheme. I didn't know what it was.

Q. When did you next hear from this matter, or about this matter?

A. I didn't hear anything about it then until—(interrupted).

Q. That was on Monday at what time?

A. On Monday, I imagine between 11 and 12 o'clock. It was when I got back from the hospital.

Q. When did you next hear anything about this?

A. So, on the following day when I came back from the hospital, Mrs. Hall came from a visit to Mrs. Lappi, and the matter was brought up between us again.

Q. And thoroughly discussed at that time?

A. Yes.

(Testimony of M. F. Hall.)

Q. Has the bill for the remainder of your account for this operation and treatment been paid?

A. No.

Q. Have you sent any bill to her?

A. I mailed her a bill on the first of October.

Q. And no response to it. Is there anything that occurs to [258—211] you, Doctor Hall, with reference to the child Selma Lappi, which occurs to you that I have not asked you about, that has any bearing upon this matter? It seems to me I have covered the ground, but there may be something that occurs to you. If there is, you may state it.

A. You mean with regard to her treatment, or what?

Q. I thought there might possible be something that I have overlooked, but if you think of nothing, we will go to a later phase of the this case—about the child Charlotte Geis. You heard her testimony yesterday? A. I did.

Q. I will ask you how long you have known the child.

A. I have known Charlotte since 1906.

Q. Have you had occasion to treat her or care for her in your professional capacity as a physician?

A. My books show that I treated her twice; once in September, and once in October, of 1910. She had a sty on the lid of one of her eyes.

Q. Do you know the Geis family?

A. I do.

Q. Have you at any time acted as the family physician for the Geis family? A. I have.

(Testimony of M. F. Hall.)

Q. For how long a period of time?

A. Several years.

Q. Do you remember of Charlotte being at your office on an occasion—I will ask you if you had occasion some two years ago to treat the little boy Charley Geis?     A. Yes, sir.

Q. Describe what that was for?

A. I treated Charley in the month of August, 1912—that is three years ago next August—for a cut over his eyebrow [259—212] I think it was the right eyebrow. He said he was struck with a baseball bat, and I treated him.

Q. Do you remember the circumstances of his coming to your office?     A. I do.

Q. Do your books show that, or do you remember it?

A. I remember it, and my books also show (reads) on August 10th, 11th and 12th,—

Q. They show that he was at your office.

A. Yes.

Q. In connection with this cut that he had that you treated.     A. Yes.

Q. On any of those occasions did his sister Charlotte come with him?     A. Yes.

Q. On more than one occasion?

A. I don't think so.

Q. You don't remember, or do you remember which occasion of these three it was that Charlotte came with him?

A. She was there the last treatment.

Q. How long was she there while you were dress-



(Testimony of M. F. Hall.)

ing his cut?     A. About ten minutes.

Q. Were you occupying the same offices then that you are occupying now?     A. No.

Q. Where were your offices at that time?

A. I occupied the rooms in the front corner of the building, over the Red Cross drugstore. Those I occupy now are just over the rear part of the Red Cross.

Q. Your operating room of the old offices was on the corner?

A. Yes, on the corner, three windows on this street and one [260—213] on Second.

Q. On the occasion of Charlotte coming there, do you remember while you were attending to the boy what the little girl was doing?

A. Yes, she was—(interrupted).

Q. Where did this treatment occur?

A. In the consultation or operating room, whatever you choose to call it.

Q. Where was Charlotte at that time?

A. While I was dressing Charley, she was sitting at the desk in the same room with us. The dressing-table in that room faced the same as facing me; supposing the windows are on this side of the room, it would be the same place as this table is, and my desk stood in here in this corner of the room, and there was a chair behind it, and the couch was in the corner beyond. When she came in she was poking around the desk, and I went over and gave her some crayons or some colored pencils and I laid out some paper for her to play with, and she stood there and

(Testimony of M. F. Hall.)

wrote her name and her age and Charley's name and his age.

Q. How old was she at that time, do you remember, about?

A. She was seven years old, a little over. And when I got through with Charley, I went around there and sat down in the chair where she was doing this, and picked her up in my lap and was looking over the work she had done and talking about it, criticising it.

Q. Where was the boy at that time?

A. He stood right beside the table, right beside the desk.

Q. Do you remember on this occasion whether the boy went out before Charlotte, or whether he was there during the whole time she was there? What is your recollection of it? [261—214]

A. He left just a moment or two before she did.

Q. Go ahead and tell what occurred.

A. I remember asking the kid whether she had ever seen anybody make money, and she said, "No." I said, "Do you want to see me make some?" And they both said, "Yes." And I had a piece of tin-foil there that came out of a cigar-box. I think it came out of a cigar-box. I took a half a dollar and rubbed it with a piece of wood or a lead pencil so as to make the impression of the money on this tin-foil. Then I took a pair of scissors and cut it out of that; entertaining them. And then I took a piece of paper and the but end of a lead pencil and laid it over the coin, and sat there for quite a few minutes,



(Testimony of M. F. Hall.)

and I would let them try it to see what they could do. During this time Charlotte sat in my lap, and I won't be positive it was before Charley went away, but Charley went to the door once or twice and said; "Sis, aren't you coming?" But she was very busy about this, and wanted to make some more money. I am not sure if it was just after Charley went out of the room, or just before, that she looked up quick and said, "You never saw the cut I have, did you, on my leg?" I said, "No." She said, "I will show it to you." So she pulled up her little dress, and pulled up her bloomers, slid them up on her leg and said, "There it is there." I put my hand down on it and felt of it, felt of the scar there, and said, "You did get a cut there and a big one." And I asked her a few questions about it while I was looking at it and examining it. And then she went on with her work.

Q. You heard her statement yesterday that she had spoken to you about this, but hadn't showed it to you, but had pointed to where it was through her dress. Is that true? A. No. [262—215]

Q. You have seen that wound? A. I have.

Q. On this occasion? A. On that occasion.

Q. On any other occasion? A. No.

Q. Will you describe where that wound is located, and give a description of it, and what you saw there at that time?

A. As I remember it, that wound was a ragged, jagged wound. It was long. The length of it, the longest part of it was lengthwise of the limb, and it was an irregular wound; and extending from one



(Testimony of M. F. Hall.)

side of it, my impression now is that the scars run from the main scar, which run lengthwise,—that there were more extensions of that ragged scar extending from that more to one side than to the other. The wound must have been an inch and a half or two inches long, or near that at that time, and it was purple; reddish in some parts and purple in the other part of it. That was the color.

Q. Could you tell from the appearance of it how old it was?

A. It was not a very old wound, but it must have been healed over for several weeks.

Q. It was entirely healed over.

A. Yes, entirely healed over. There was no dressing on it of any kind, and it was entirely healed.

Q. Show to the jury, and explain to them where that wound was located upon her leg. Do you remember which leg it was on?

A. I think it was on the right leg.

Q. How far up on the leg would it be?

A. My recollection is that it was pretty high up. It was at least two-thirds of the distance from the knee to the [263—216] hip bone here. I should judge about two-thirds or three-quarters of the way up here, and well down on the inside.

Q. You placed your hands on it and examined it, and talked to her about it?

A. I did, and I asked her all about it; when she got it, and how, and who took care of it, and how long it was healing up. I asked her a lot of questions about it.

(Testimony of M. F. Hall.)

Q. On that occasion was there anything else done by you as far as touching her person with your hands?     A. No, sir.

Q. On that occasion, or I will ask you if upon any occasion, did you ever place your hands on the private parts of Charlotte Geis in the way that was indicated here yesterday?     A. No, sir.

Q. After she had asked you this question, whether you had ever seen this cut she had, and showed it to you, and you examined it, how long was she there after that?     A. Just a very few minutes.

Q. When did you ever hear, or when was the first time that you ever heard, any statement or any report with regard to you having mistreated Charlotte Geis, since that time? When was the first time that you ever heard about it?

A. It is two or three weeks; not over three weeks ago, and not less than two weeks.

Q. Do you remember from whom you heard it?

A. I heard it from Doctor Hedger.

Mr. MARQUAM.—You may cross-examine.

(The Court takes a short recess, jury in charge of bailiffs. Trial resumed after recess; the defendant and jury present.) [264—217]

M. F. HALL, resumes his testimony.

Mr. MARQUAM.—Just one more question

Q. I would like to ask you this question: What would be the probable effect from lapse of time upon a wound such as the wound that you described that Charlotte Geis has, from the *the* time that you saw it until the present time, that is, in regard to its size?

(Testimony of M. F. Hall.)

What would be the probable result in the meantime?

A. That was two years and a half ago. It would be smaller. It would have an appearance of being smaller and more contracted, and the color of it would have changed very much by this time; instead of being purple and reddish, it would be white, a lighter color than the surrounding skin, except when the skin was cold. When cold it would turn blue.

Q. As to the size of the wound, you say it would be smaller?      A. Probably smaller.

Q. Taking into consideration the age of the child at the time you saw it.      A. Yes.

Mr. MARQUAM.—You may cross-examine.

Cross-examination.

(By Mr. ROTH.)

Q. Where did you say that wound was on Charlotte's leg?

A. On her thigh, on the inner side of the thigh of her leg.

Q. And the length of the wound was with the length of the leg?

A. As I remember it, the general direction was with the length of the leg, the general direction.

Q. And it was nearer the hip bone than the knee bone.      A. Yes. That is my impression.

Q. You think about two-thirds or three-quarters of the distance.

A. It was a little beyond the middle, anyway. I can't be [265—218] positive about that.

Q. You took very particular notice of the wound at that time.



(Testimony of M. F. Hall.)

A. I did. It impressed me at the time, as all those things do.

Q. You had been the family physician for the Geis family prior to that for sometime.

A. I think from 1906. I don't remember exactly.

Q. And you acted for Mrs. Geis in a confinement case immediately after this, did you not?

A. About four or five days afterward. According to my books the last time Charley was at my office was on Monday the 15th—Monday the 13th, and this child was born—(witness examines book). The 10th, 11th and 12th were the days that Charley was at the office, and the baby was born on Sunday the 18th, following.

Q. Do you remember the occurrence of an excursion on the river?

A. There was an excursion held that week. I don't remember the date.

Q. Do you remember that that was Saturday; that the excursion was on Saturday?

A. I don't remember positively about that. I remember I stayed away from the excursion on account of Mrs. Geis, expecting to be called to attend her.

Q. Do you remember what day Mrs. Geis went to the hospital?

A. She went to the hospital, I think it was Sunday.

Q. The child was born on Sunday, the 18th?

A. Yes. I won't be positive whether she went the evening before, or whether she went in the morning.

(Testimony of M. F. Hall.)

Q. Don't you think it was the day before that she went to the hospital that Charlotte came to your office with Charley? A. No.

Q. You couldn't possibly be mistaken about this wound being [266—219] up and down the leg?

A. Certainly it is possible for me to be mistaken. I just state my impression, as I remember it.

Q. Well, I understood you were describing the wound. A. As I remembered it.

Q. For the purpose of showing that you did see the wound at the time. A. Yes.

Q. Now, if it should transpire that that wound was straight across the leg instead of being up and down at all, you would be very much surprised, wouldn't you?

A. No, I won't say that I would be surprised, but I would say that my memory hadn't served me properly.

Q. Might it not be so that you inquired about that from Mrs. Geis? A. No.

Q. And you are speaking from memory of what she told you? A. No.

Q. Or speaking from memory from what Charlotte Geis told you, without seeing the wound?

A. No, I saw the wound. Charlotte showed it to me, as I said.

Q. When did you first see Mr. Lappi, the father of Selma, after the 24th day of September, 1914?

A. It was either the 18th or 19th, I think, of August. I sent out for them to come in.

Q. I mean after the 24th day of September, when

(Testimony of M. F. Hall.)

was the first time that you saw John Lappi, the father of Selma?

A. I beg your pardon. On his return from Ruby, after he came back from Ruby, sometime in the winter.

Q. Where did you see him?

A. I saw him at the Moose hall. [267—220]

Q. Didn't you see him in the Fairbanks Saloon?

A. Not that I remember of.

Q. You say you mailed a bill for the balance on the 1st day of October, 1914. A. Yes.

Q. To whom did you address it?

A. To Mr. John Lappi.

Q. Where? A. Fairbanks.

Q. Of course, you know that Mr. John Lappi wasn't here then. A. I did.

Q. For how much was the amount?

A. Sixty-five dollars.

Q. Didn't he pay you sixty-five dollars?

A. He paid me sixty dollars.

Q. Didn't he pay you sixty-five?

A. I don't think so. I will look at my book and see.

Q. You have it right there? A. I have.

Q. See if it was not sixty-five dollars that he paid you.

A. (Examines book.) September 9th. Credit \$63.00.

Mr. ROTH.—That is all.

Mr. MARQUAM.—That is all. [268—221]



**[Testimony of Thomas Dundon, for Defendant.]**

THOMAS DUNDON, a witness for defendant, after being first duly sworn, testified as follows to wit:

Direct examination.

(By Mr. MARQUAM.)

Q. Your name is Thomas Dundon.      A. Yes, sir.

Q. You reside in Fairbanks,      A. I do.

Q. What is your business?      A. Steam fitting.

Q. Employed by the N. C. Company?      A. Yes.

Q. You have just left your work now to come here?      A. I did.

Q. I will ask you if you remember of having done any work in the Red Cross building in the offices occupied by Doctor Hall sometime last year, last fall.

A. I do.

Q. Have you had occasion to refresh your memory as to the time that you were there, from any memorandum or book that you have?

A. From a daily report that I keep.

Q. Tell the jury on what day you were there working, doing that work.

A. By my book on September 24th.

Q. Just describe to the jury what work you were doing, and what rooms you were in, and how long you were there, if you remember.

A. Why, the purpose I was there for, I was making a connection [269—222] in the rooms in the front of the Red Cross Building that are occupied by the dentist Trabue, and I had to make a connection from the corner of the building. There was a

(Testimony of Thomas Dundon.)

steam pipe coming up there, and a valve, and this steam fed the building. While these rooms were not occupied, this valve was closed.

Q. Which rooms were not occupied?

A. The front rooms.

Q. Those were Doctor Hall's old offices?

A. His old offices. Whenever they were occupied, I had to get back in there and make that connection. That was the purpose I was there that day, making that connection to heat the rest of the front of the building.

Q. Do you remember or know a child by the name of Selma Lappi?

A. Why, I know the girl by name better than I do by sight.

Q. I will ask you to state Mr. Dundon if at any time you were in the doctor's offices there in connection with your work, and having occasion to go into Doctor Hall's offices—the ones that he occupied then, did you see a child of that description in there?

A. I want to answer right. Of course, I saw a child, but as to who the child was I couldn't say.

Q. How old a child was it? About how old, could you tell?

A. Well, I couldn't. I couldn't say what time it was. My books show I was there three hours that day, but I don't know just the exact time. I know it was a young child.

Q. The only notation in your book is for the purpose of keeping the time in order to charge for it.

A. That is all.

(Testimony of Thomas Dundon.)

Q. And the charge was for three hours that day.

A. For three hours work there. [270—223]

Q. During that three hours would you say that you were there continuously, in and about those rooms? A. Practically speaking, yes.

Q. I will ask you to state if you had occasion to speak to Dotocr Hall at any time you were around there for any purpose at all.

A. Why, as a general rule after I am through, I go around the building, if I have the steam turned off, go around the building and see if there are any leaks, or anything; and I think on my last trip, as I was going from room to room, I stepped to Doctor Hall's office—There are two rooms, and the door was closed to my recollection of the last time there—and I rapped at the door, and he said, "Come in." Of course, the exact words he said I don't remember exactly, but I understood he said, "Come in," and "Come in and out any time," something like that. As to be positive to that, I couldn't repeat what he said.

Q. How many times were you in Doctor Hall's office that day in connection with your work, have you any recollection? A. That is hard to say.

Q. I am talking now about what is known as the operating-room that he occupied at that time.

A. Oh I might have been in there half a dozen times, or a little less. I couldn't say exactly.

Q. At any time while you were working around there, was the door to Doctor Hall's office locked, that is, to the inner office?



(Testimony of Thomas Dundon.)

A. Not to my knowledge.

Q. Whenever you had occasion to go in there, describe to the jury whether you stopped and knocked or rapped before you went in, or went right in there, as the occasion required? [271—224]

A. As near as I can recollect the door was closed; naturally I would rap at the door, and I think he said; "Come in."

Q. On these different occasions? A. No.

Q. I mean the times prior to the one you have just described. A. I think the door was open.

Q. What I want to find out is: When you would go in or out there, was there any difficulty about your getting right into that inside office.

A. Not at any time.

Mr. MARQUAM.—You may cross-examine.

Mr. ROTH.—No questions.

Mr. MARQUAM.—That is our case. Defendant rests. Wait a minute.

(The following proceedings occur in the presence of, but not in the hearing of, the jury.)

Mr. STEVENS.—The defendant in this case having concluded his testimony and being about to announce that the case of the defendant is closed, now moves the Court to instruct the jury to find the defendant not guilty, upon the grounds of the insufficiency of the testimony in this case to sustain a verdict, and for the following reasons: For the reason that the witness Selma Lappi has shown herself to be incompetent to be a witness; and for the further reason that the witness Charlotte Geis has shown

(Testimony of Thomas Dundon.)

hercelf to be incompetent as a witness herein, and that the matters and things testified to by her are not connected with this case, that the occurrence which she related upon the stand are too remote in time, and otherwise wholly incompetent to show any design or intent or system of action upon the part of the defendant herein as to the matters and things alleged [272—225] in the indictment against the defendant; and for the further reason that the Court erred in admitting Mrs. John Lappi to testify in this case that the said Selma Lappi made to her a complaint of the offense charged in the indictment; and for the further reason, as above stated, that the testimony is insufficient to sustain a conviction.

The COURT.—The motion is denied.

Mr. STEVENS.—Defendant reserves an exception.

The COURT.—An exception may be allowed.

(The following occurred in the hearing of the Jury.)

Mr. STEVENS.—We rest our case.

Defendant rests.

**[Testimony of John Lappi for Plaintiff (in Rebuttal).]**

JOHN LAPPI, a witness for plaintiff, in rebuttal, after being duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. ROTH.)

Q. What is your name?      A. John Lappi.

Q. Do you know Selma Lappi?      A. I do.

(Testimony of John Lappi.)

Q. What relation do you sustain to her?

A. She is my daughter.

Q. Where did you live on the 24th day of September, 1914?

A. Well, I was wanting to—(interrupted).

Q. Where did you live at that time?

A. Right at the home, corner of 11th and Cushman.

Q. In the town of Fairbanks?      A. Yes.

Q. Did you leave the town of Fairbanks and go anywhere at that time?      A. Yes, I did. [273—226]

Q. Where did you go?

A. I was going down to Ruby.

Q. What time of day did you leave?

A. 9 o'clock in the morning.

Q. Prior to that time had you been with your daughter Selma to Doctor Hall's office?

A. I was there once, yes.

Q. Who went with you?

A. Selma, and Arthur was with me too.

Q. Who is Arthur?

A. That is my boy. No, Selma went alone there with me.

Q. Selma was there alone with you?      A. Yes.

Q. When was that?

A. Well, I couldn't remember the date exactly. I had come over here and stayed just about a week before I went down to Ruby. I had come out from Fairbanks Creek. I couldn't say exactly the day—what date I went with her to Doctor Hall's office.



(Testimony of John Lappi.)

Q. Well, at the time you went with Selma to Doctor Hall's office, what was done by Doctor Hall to the neck, and what did Selma do?

A. Doctor Hall was dressing her neck, and just pulled that cloth off it—the sticking plaster, and dressed her neck.

Q. How did he take that off?

A. He kind of loosened it up, and Selma was standing on the operating-table.

Q. Was she standing or sitting on it?

A. She was sitting on it, and he kind of loosened it up a little, and all at once he kind of dragged it out. [274—227]

Q. What did Selma do?

A. She was getting a little nervous and started for crying a minute or two, and that was all there was to it.

Q. At that time did you see the doctor wash the rubber, or whatever it was, off that was left on the skin there when he took the dressing off?

A. Yes.

Q. What did he use to take that off?

A. I couldn't tell you what he was using.

Q. What did Selma do when he was using that wash to take it off of there, if anything?

A. She was kind of frightened on account of it smarting a little.

Q. Well, did she throw herself back onto the table and stiffen up?

A. She was just a little nervous, that was all. She was crying a little while, and I was over there

(Testimony of John Lappi.)

with her, and that was all over.

Q. When was the last time that you looked at the sore on the neck of Selma before you left on the morning of the 24th day of September?

A. I didn't look on the 24th day of September, but I looked just about a day before I went.

Q. Are you sure that you looked the day before you went?

A. Well, either the day before, or either the day before that.

Q. Either a day or two before you left?

A. Yes.

Q. Just tell the jury what was on that wound at the time you looked at it that time?

A. Nothing on except the handkerchief over the neck. [275—228]

Q. Was there any adhesive plaster or any dressing on the wound itself? A. Not at that time.

Q. Are you positive of that?

A. I am positive of that.

Q. When did you first see Doctor Hall after you left Fairbanks on the 24th day of September, 1914?

A. That was the same evening when I came back to Fairbanks.

Q. When was that?

A. That was the 18th day of September, 1914.

Q. Where did you first see him?

A. In the Horseshoe corner.

Q. Just tell this jury what happened in the Horseshoe corner when you saw Doctor Hall at that time?

(Testimony of John Lappi.)

Mr. MARQUAM.—Any conversation?

Mr. ROTH.—No.

Mr. MARQUAM.—Then I object as incompetent, irrelevant and immaterial. (Objection sustained.)

Mr. ROTH.—You may cross-examine.

Cross-examination.

(By Mr. STEVENS.)

Q. Mr. Lappi, you are unable to state just exactly when it was with reference to the date when you last examined Selma's neck, are you not?

A. When I last examined Selma's neck was just the time when I was over there with Selma and Doctor Hall was telling me that she has got only two or three calls to make and she would be all right.

Q. When was that?

A. That must have been either the 20th or 21st of September [276—229] when I was there with Selma at that time.

Q. Do you remember when you paid Doctor Hall the money? A. Yes, I do.

Q. How much was that?

A. That was sixty dollars, three \$20 gold pieces.

Q. That was on account, was it, of his bill?

A. Yes.

Q. Did you take a receipt from him?

A. Yes, sir.

Q. Have you got it with you? A. No, sir.

Q. Do you know where it is?

A. I guess that is up to the house.

Q. Do you know how much his entire bill would be for that operation? A. About \$125.



(Testimony of John Lappi.)

Q. \$125 was the agreed price. And that \$60 was the only money that you ever paid him.

A. That was all.

Q. Was he ever paid any other money besides the \$60 by you or your wife or anybody that you know of?

A. No, sir, not that I know of.

Q. Did you get a bill for the balance of \$65?

A. No, sir.

Q. Through the postoffice?

A. I never got the bill.

Q. You never got Doctor Hall's bill through the postoffice for the balance of \$65.

A. No, sir.

Q. Did your wife ever get the bill. [277—230]

A. I never asked her whether she got the bill or not.

Q. During your absence at Ruby, did your wife get your mail out of your box or out of the postoffice for you?

A. We haven't got a mail-box.

Q. Did your wife get your mail during your absence from Fairbanks?

A. Yes.

Q. Now, do you know when the payment of that \$60 was?

A. The payment was never set at all.

Q. What?

A. We didn't set the time at all.

Q. Do you remember what date it was that you paid the \$60?

A. Well, I couldn't remember exactly the date, but that was around the 20th of September.

Q. Wasn't that the 9th of September that you paid the \$60?

(Testimony of John Lappi.)

A. I couldn't remember what date, but that was around that part of the month anyway, because I was around for about six days when I was come from Fairbanks Creek, and then I went down to Ruby. I was fixing the house over, fixing the cellar and one thing and another, and I wanted to hurry up and get down to Ruby before the freeze-up.

Q. You think the payment of the \$60 might have been made on the 9th of September? A. No.

Q. Will you find that bill and the receipt, and find out the date that you paid that, and bring the receipt into court?

A. Well, I guess that must be up at the house somewheres.

Q. Can you find it? A. I guess I can.

Q. I would like to have you find that for us.

The COURT.—Do you want that now? [278—231]

Mr. STEVENS.—Yes, I would like to have that now.

(Agreed that Mrs. Lappi go after receipt.)

Q. Now, Mr. Lappi, was it the day that you paid this \$60 to Doctor Hall that Doctor Hall said it wouldn't take very many more treatments before it would be all right or well? A. Yes.

Q. That was the day.

A. That was the only day I was with Selma in the office.

Q. The only time you went with Selma.

A. Except before they took the second operation. I was there before that.

(Testimony of John Lappi.)

Q. That was in August?      A. Yes, sometime.

Q. The second operation was in August. The first operation was at St. Joseph's Hospital.

A. Yes, the same as the second one.

Q. And the second operation was in Doctor Hall's office?      A. No, it was at the hospital.

Q. You were there at the second operation when they gave her chloroform?

A. I was there with them then.

Q. Now, the only time you were in Doctor Hall's office—      A. Two times.

Q. And the last time you were in Doctor Hall's office with Selma was the day that you paid this \$60.

A. Yes.

Q. How long was it after that time that you paid the \$60, that you examined Selma's neck?

A. Well, I saw her neck before I went down to Ruby.

Q. You don't know how long it was before you went to Ruby.

A. A few days, that is, either two or three days.  
[279—232]

Q. Only two or three days before you went.

A. I believe the 23d day of September I was looking at it, and wondering how big a scar would be left there in her neck

Q. The 23d day would be just the day before you left.      A. Yes.

Q. But I understood you to say that it might have been two or three days before you left.

A. Well, just about a couple of days before, yes.



(Testimony of John Lappi.)

Q. It might have been three days.

A. Well, I couldn't tell you exactly.

Q. You say at that time she had a handkerchief around her neck.

A. Yes, a handkerchief around her neck.

Q. And, as I understand you, she didn't have any of this adhesive plaster.

A. No plaster at that time.

Q. Or tape, as they call it.

A. Not at that time, because she was just about well at that time when I went down to Ruby.

Q. Where were you when you examined her this time?     A. Right there at home.

Q. In the house?     A. Yes.

Q. Anybody else present?

A. Me and Selma and the boy and my wife.

Q. Did you take the handkerchief off?

A. Just pulled the handkerchief down.

Q. And you didn't untie the handkerchief.

A. No.

[280—233]

Q. Then you went away on the morning of the 24th.     A. On the 24th of September.

Q. About what time?

A. 9 o'clock in the morning.

Q. Did you leave in a small boat?     A. Yes.

Q. Is Mrs. Lappi a nervous woman, would you say?

A. Well, I don't think I can call her a very nervous woman.

Q. Is she inclined to be excitable?

(Testimony of John Lappi.)

A. No, I don't hardly think so, no.

Q. Has the little girl been inclined to be nervous at times?     A. No.

Q. This girl. She is not inclined to be nervous?

A. No, she is not what you would call nervous. No.

Q. Particularly during the time that she has had this trouble. Wouldn't that make her fretful and nervous, or did it?

A. Just the time when he pulled that plaster out, it hurt her neck, and any child would get hurt that way, sure.

Q. The fact that she had been troubled with that sore neck for a long time—(interrupted).

A. No, that lump has been there quite a while, but that never troubled her until last summer.

Q. Didn't it pain her a good deal?

A. No, not until last summer.

Q. Wasn't it inclined to reduce her flesh? Didn't she kind of run down by reason of having that?

A. Yes, a little bit.

Q. Wouldn't that naturally make her fretful and nervous, more so than she would have been if nothing was the matter with her?

A. A little nervous as long as a person doesn't feel good. [281—234]

Q. You say your wife, Mrs. Lappi, is not a fretful woman at all, and not excitable.     A. No.

Mr. STEVENS.—You may take the witness.

Mr. ROTH.—That is all.

[Testimony of **Mrs. A. J. Nordale**, for Plaintiff (in Rebuttal).]

MRS. A. J. NORDALE, a witness for plaintiff, in rebuttal, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. ROTH.)

Q. What is your name?     A. Mrs. A. J. Nordale.

Q. Are you the wife of A. J. Nordale?

A. Yes, sir.

Q. Do you know Mrs. John Lappi?

A. Yes, sir.

Q. Do you know here daughter, Selma Lappi?

A. Yes, sir.

Q. Do you remember last fall the fact of John Lappi leaving Fairbanks for Ruby?     A. Yes, sir.

Q. Before he left for Ruby did you make an examination of the wound on Selma's neck?

A. Yes.

Q. How long before he left did you make this examination?

A. About a week or over. I do not remember.

Q. Did you make more than one examination?

A. No.

Q. Mrs. Nordale. Tell this jury what kind of dressing was on that wound at the time you examined it? [282—235]

A. It was a silk handkerchief. It was wrapped around her throat, something rapped around her throat.



(Testimony of Mrs. A. J. Nordale.)

Q. Was there any adhesive plaster or any dressing of any kind on the wound itself?     A. No, sir.

Q. Are you positive of that?

A. Yes, for if it had been, I wouldn't have noticed the wound. For I said: "Selma will have a very ugly scar."

Mr. ROTH.—You may cross-examine.

Cross-examination.

(By Mr. MARQUAM.)

Q. Where did this examination take place?

A. Right at my home.

Q. Who was present?     A. Mrs. Lappi.

Q. What was the occasion of making the examination?

A. For I always took an interest in Selma. I had her with me for two weeks previous, and I took very much interest in Selma.

Q. She stopped with you for sometime while Mrs. Lappi was out on the creeks.     A. Yes, sir.

Q. And while she was taking these treatments from Doctor Hall.

A. It was before the big operation that she stayed with me. She had two operations.

Q. That was during the period between the time the neck was lanced,—     A. Yes.

Q. —and the time that she was given the anesthetic and the main operation took place.

A. Yes, sir. [283—236]

Q. That she was stopping with you.     A. Yes.

Q. And Mrs. Lappi was stopping out on the creek during that time.     A. Yes, sir.

(Testimony of Mrs. A. J. Nordale.)

Q. During that period of time did you go down to the office with her, or your little daughter?

A. No, sir, my daughter did.

Q. And there were no bandages at the time she was staying in your house, there was no tape on it, except just a wrapping of gauze around it.

A. The doctor treated her then, and it had a bandage and gauze and things around.

Q. Describe to the jury what was on there at that time when she was stopping with you at your house.

A. I don't know exactly, because it was always around it, always bandaged.

Q. What kind of bandages were they?

A. Regular bandage, a surgeons bandage.

Q. There are different kinds of bandages. Can you describe them more clearly?

A. Just a surgeon's bandage.

Q. Did it stay on itself, or was it tied on?

A. It was pinned on with safety pins.

Q. After that the main operation took place.

A. Yes, sir.

Q. And after the main operation took place, did Selma stay up at your house at any time?

A. No, sir. She came there frequently to see me.

[284—237]

Q. What kind of bandages did she have on on these different occasions? A. The same as before.

Q. Just the common ordinary surgeon's bandage.

A. Yes.

Q. And you can't describe them any more accurately. A. No.

(Testimony of Mrs. A. J. Nordale.)

Q. Were they white?     A. White.

Q. And soft? Are they something like cheese-cloth?     A. Yes.

Q. And you wrap them around, and in order to keep them on you pin them on and tie them on?

A. Yes.

Q. And that is the only kind of bandages she ever had on.

A. No. When she was at my house the last time before Mr. Lappi left, she had a silk handkerchief, or some cloth, around her neck.

Q. Outside of the silk handkerchief, or some cloth around her neck, none of the times she was at your house did you see any bandages on except the ones you have described.     A. That is right.

Q. She was there frequently.     A. Yes.

Q. You are a friend of the family, and she visited back and forth.     A. Yes.

Q. How often during that time do you think you would see her?     A. I couldn't say. [285—238]

Q. Every day or two?     A. No.

Q. Every few days?     A. Yes, sir.

Q. At least once or more a week, would you say?

A. Yes, sir, about.

Mr. MARQUAM.—That is all.

Mr. ROTH.—That is all.



**[Testimony of Mrs. John Lappi, for Plaintiff (in Rebuttal).]**

MRS. JOHN LAPPI, witness for plaintiff, in rebuttal, heretofore sworn, testified as follows, to wit:

**Direct Examination.**

(By Mr. ROTH.)

Q. Mrs. Lappi, on the 24th day of September, the last day that Selma went to Doctor Hall's office for a treatment, what kind of bandage did she have on her neck?

A. She had a man's silk handkerchief, which she is wearing right now, and every day.

Q. What bandage, if any, was on the wound?

Mr. MARQUAM.—We object—

A. Nothing.

Mr. MARQUAM.—This is not rebuttal, because it was gone into with this witness on direct examination.

The COURT.—She may answer the question.

(Mr. ROTH.)

Q. For how long a time before the 24th day of September was no bandage or dressing of any kind such as adhesive plaster or gauze or cotton, anything of that kind, put on that wound? (Defendant objects as leading. Objection sustained.)

Q. Mrs. Lappi. State if at any time prior to the 24th day of September in the dressing of this wound, gauze or adhesive [286—239] plaster had been left off the dressing of the wound of Selma Lappi?

(Defendant objects as leading. Objection sustained.)

(Testimony of Mrs. John Lappi.)

Q. State the condition of the dressing of this wound by Doctor Hall from the 24th of September back.

A. Well, there was nothing on it except a silk handkerchief for about two weeks or over with just vaseline on it. He told me to put just the vaseline on it, and he said he had put powder on it at the office.

Q. Did you tell Mrs. Hall when she came to your house on Monday following the 24th day of September, 1914, that Selma at first told you that nothing had happened in Doctor Hall's?

A. No, Mr. Roth. Without a question—(interrupted).

Q. That answers the question. Now, did you tell Mrs. Hall at that time that Doctor Hall wouldn't get another cent? A. I did not.

Q. Mrs. Lappi. Did you receive a bill from the postoffice from Doctor Hall for the balance of the fee of \$65 that was due him?

A. I did not, Mr. Roth.

Q. Did you receive any communication or any envelope from Doctor Hall addressed to Mr. John Lappi through the postoffice? A. I did not.

Mr. ROTH.—You may cross-examine.

Cross-examination.

(By Mr. MARQUAM.)

Q. Did Mr. Lappi, while he was at Ruby, receive mail from here, sent from the postoffice here, or did all his mail remain here?

A. Well, he didn't get any mail. He didn't even

(Testimony of Mrs. John Lappi.)

get a letter from his mother. [287—240]

Q. What I am getting at: Do you know whether he left directions with the postoffice here when he went below, or with anybody else, to forward his mail to Ruby?

A. It was with me that he left the orders, and there was only bills from the N. C. Company and the light bill, and I paid them, and kept them.

Q. And all mail that would be addressed to him and deposited in the postoffice here you had made arrangements to get. A. I didn't catch that.

Q. I understood you to say that all mail that would be deposited in the postoffice here addressed to John Lappi you were to receive.

A. I were to receive. And if there was any sent to him I would have seen it, but there was none.

Q. And you at no time since the 24th of September have received, either in your own name or in John Lappi's name, a bill for the balance of the fee.

A. I did not.

Q. How much was that fee?

A. It was to be one hundred dollars.

Q. It was not one hundred and twenty-five dollars? A. No.

Q. If John Lappi says it was a hundred and twenty-five dollars, he is mistaken.

A. No, it was not, because when Mr. Lappi went to pay that bill Doctor Hall wanted \$125. I didn't say a word about that.

Q. If he said that it was to be \$125, he was mistaken.



(Testimony of Mrs. John Lappi.)

A. I don't know, because Doctor Hall may have told him.

Q. I understood you to say it was to be \$100.

A. Doctor Hall told me it was to be \$100.

Mr. MARQUAM.—That is all. [288—241]

**[Testimony of Selma Lappi, for Plaintiff (in Rebuttal).]**

SELMA LAPPI, witness for plaintiff, in rebuttal, heretofore sworn, testified as follows, to wit:

Direct Examination.

(By Mr. ROTH.)

Q. Selma, the last time you went back to Doctor Hall's what kind of dressing was there on your neck?

A. I don't think there was no dressing on.

Q. What was on the neck? How was it dressed? How was it fixed up?

A. I think there was a handkerchief only around it.

Q. Do you know how long before that your neck had been dressed? I withdraw that question. Do you remember how long before the last time it was that you went up to Doctor Hall's office—how long before that it was that you went up there before?

A. I don't remember.

Q. The last time that you went there did Doctor Hall rub your stomach on the outside of your clothes? A. No.

Q. Did he put his hand inside of your panties and rub your stomach?

A. Yes. Not my stomach, but just around here (showing).

(Testimony of Selma Lappi.)

Q. Did you tell him at that time on that last day that you were there that your stomach hurt you?

A. I don't remember.

Mr. ROTH.—That is all.

Mr. MARQUAM.—That is all.

(Trial continued until Thursday, April 22, 1915, at 10 A. M., and the jury withdraw in custody of the bailiffs, after receiving the usual admonition.) [289—242]

Thursday, April 22, 1915. 10 A. M.

Jury and defendant in court, and trial resumed.

**[Testimony of John Lappi, for Plaintiff (Recalled in Rebuttal).]**

JOHN LAPPI, witness for plaintiff, recalled in rebuttal, and heretofore sworn, testified as follows:

Direct Examination.

(By Mr. ROTH.)

Q. Did you produce that receipt that was called for? A. Yes.

Q. Have you it?

A. I have got it with me. (Produces same.) I am mistaken in the date. I made a quick trip in town here, and it was the 9th of September instead of the 20th.

Mr. MARQUAM.—We object to any explanation. (Mr. ROTH.)

Q. Mr. Lappi, can you now since you saw this receipt state when you received the receipt, when you made the payment of that money?

A. Yes. I remember that I paid it on the 9th of September.

(Testimony of John Lappi.)

Q. How did you come to make the statement before that it was within a week of the 24th of September?

(Defendant objects; sustained.)

Mr. ROTH.—Well, here is the receipt.

Mr. MARQUAM.—We wanted to correct the date, that is all, and now we have it.

Mr. ROTH.—That is all.

**[Testimony of J. A. Sutherland, for Plaintiff (in Rebuttal).]**

J. A. SUTHERLAND, a witness for plaintiff in rebuttal, after being duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. ROTH.)

Q. What is your name?      A. J. A. Sutherland.

[290—243]

Q. What is your profession?

A. Physician and surgeon.

Q. Are you acquainted with Charlotte Geis?

A. Yes.

Q. Did you make an examination of a scar upon the leg of Charlotte Geis?      A. I did last night.

Q. Where did you find that scar?

A. (Holding paper in his hand.) The scar was on the right leg, about six inches above the center of the knee-cap on the inner side of the leg, and about eight and a quarter inches from this spine of this bone here, the anterior spine of—the anterior superior spine of the ilium, and about five inches and a half approximately from the crotch. Do you want



(Testimony of J. A. Sutherland.)

a description of the scar?

Q. Yes, describe the scar.

A. The scar was about an inch and a half in length and nearly a quarter of an inch wide at its widest point, a bare fraction under a quarter of an inch. The front part of the scar, or the anterior part—*anterior* means front and posterior behind—the anterior part of the scar was approximately three-quarters of an inch above the posterior part.

Q. Three-quarters of an inch or three-eighths of an inch?

A. Three-eighths of an inch I should have said. Running from before backward and on a little angle, the front part of the scar being a little higher than the back part.

Q. Describe the scar, which way it run on the leg, and where it was on the leg.

A. The scar was a little to the inner side of the leg about this portion (indicating) and run as I say—it was [291—244] located six inches above the center of the knee-cap. When the leg was extended and when the leg was straight the child standing, the front part of the scar would be three-eighths of an inch higher than the other end of the scar was. It was not across the leg, it was on the inner side of the leg.

Q. You say it was not across the leg. Was it up and down the leg?

A. No. It ran more or less in a horizontal position, but it was not across the front of the leg, as you would say, but on the inner side.

(Testimony of J. A. Sutherland.)

Q. With reference to the front of the leg, between the line of the front of the leg and the back of the leg, where was the scar?

A. The scar was a little to the inner side of the center line. It was to the inner side of the center line in front.

Q. What kind of a scar was that?

A. In what way?

Q. With reference to it being a clean cut or a ragged cut?

A. I should say that the scar was not made with a sharp instrument. The edges of it, especially the lower edge, is a little jagged, a little irregular in form, and the upper edge is similar, irregular, too. It is very hard when you have a scar that is old, to tell exactly how it has been made. The tissues contract and smooth out.

Mr. ROTH.—You may cross-examine.

Cross-examination.

(By Mr. MARQUAM.)

Q. Doctor, please state to the jury what would be in your opinion, the difference in the appearance of the scar as you saw it and what it would have been in the neighborhood [292—245] of two years and a half ago, assuming that the wound which produced this scar was made about that time. In other words of the scar, taking into consideration the age of the what would be the effect of time upon the appearance child and the health of the child?

A. The scar tissues would be much lighter in color than at the time it was made.



(Testimony of J. A. Sutherland.)

Q. What is the color of the scar now, as you observed it?

A. White, practically. Or, I mean a light color. It is flesh color, a little lighter than the ordinary flesh color.

Q. What would have been its color and appearance shortly after it had healed, or about the time of its healing or shortly after?

A. Red, or purplish red. Dark, a dusky red.

Q. Isn't it a fact, doctor, that wounds which are as you term, jagged in appearance when they are first made by reason of not being a clean cut, but made with some blunt instrument or something of that kind, that has irregular cuts in it, in a child of that age and health, after the lapse of time, isn't it true that the little radiations from that wound in the way of scars will often times disappear where they are not deep but run out to nothing? You know what I mean?

A. As long as it is through the true skin?

Q. Yes.

A. All scar tissue has a tendency to fade with time.

Q. Isn't it true that this wound has the appearance of being deep, and the fact that the scar now has the width that you have described, some quarter of an inch, shows [293—246] that it was a jagged cut, or if it was a clean cut with a sharp instrument that scar wouldn't show in the way that it shows now?

A. Not necessarily. For the simple reason that it depends a great deal on the treatment. If the scar had been brought together, drawn together closely, as a doctor would bind a clean cut wound it would hardly be that wide.



(Testimony of J. A. Sutherland.)

Q. If it was taken care of by a trained nurse, even though a doctor hadn't taken care of it, they know how to take care of a wound of that kind?

A. They might take care of it in one way, but not in another. They might take antiseptic care and not pull the edges close together, or they might attempt to pull it together by adhesive plaster and the plaster slipped, and it separated. And in that way it would produce a wider scar.

Q. Point on your own leg, as near as you can, where that scar would be.

A. It would be about in that neighborhood (indicating.) I can't judge on myself the same way as I could on another.

Q. How long was that wound primarily?

A. Primarily, I don't know.

Q. How long is that wound now?

A. One inch and a half.

(Counsel asks witness to indicate with a pencil where the wound was, and witness indicates on Mr. Marquam's leg.)

Q. The anterior part being three-eighths of an inch higher than the back part? A. Yes.

Q. And the wound now being an inch and a half long? A. Yes, sir.

Q. What would you say in regard to the size of the wound, [294—247] taking into consideration its length now, that is, the scar now, how much if any would it shrink, or how much smaller would it be now than when the cut was first made?

A. I can't say absolutely, but there is always contraction of scar tissue, and it might be half an inch

(Testimony of J. A. Sutherland.)

and it might be more,—three-quarters of an inch. It is pretty hard to answer that question.

Q. If it is an inch and a half now, would it be unreasonable to suppose from the standpoint of a surgeon, that at the time that wound was made, or about that time after it healed up, that it was two inches long? A. No, I don't think so.

Q. That would be a reasonable contraction.

A. Yes, I think so.

Mr. MARQUAM.—That is all.

Mr. ROTH.—That is all.

Mr. MARQUAM.—I would like to call the doctor and make him our witness to testify as to the method of removing this rubber adhesive tape. It is not cross-examination. It is out of order, but the doctor is here now, and I ask permission of the Court to ask that question.

The COURT.—You may ask the question.

**[Testimony of J. A. Sutherland, for Defendant (in Rebuttal).]**

J. A. SUTHERLAND, called as a witness for defendant, in rebuttal, heretofore sworn, testified as follows:

Direct Examination.

(By Mr. MARQUAM.)

Q. I ask you what the practice is, or what the proper practice is of physicians in removing the adhesive tape and the remains, the rubber residue from adhesive used in [295—248] dressing wounds. How do you remove it?

A. I usually remove it with either ether or alcohol.

(Testimony of J. A. Sutherland.)

Q. What is the general practice of physicians or surgeons, could you say?

A. You mean as to all the medicines that are used?

Q. No. What is the common ordinary way of removing this rubber adhesive that adheres to a wound? For instance, if the wound has been dressed, and it is necessary to bind the dressing on with adhesive tape, or at least that has been done, now, on removing that, or after the tape has been removed, to remove the remaining rubber that sticks to the skin in the vicinity of the wound.

A. I use ether.

Q. Would you consider it a proper practice for a physician to use chloroform for that purpose?

A. I didn't, until Sunday night.

Q. Have you tried it?      A. I tried it.

Q. How does it work?

A. It works all right. It is a better solvent than ether is. My reason for not using it heretofore was the fear of burning with the chloroform. If a person happened to get a drop of chloroform through their clothes, it is quite irritating to the skin, and for that reason I had not used chloroform for removing a plaster. On Sunday night I put a plaster on my own hand and removed it with chloroform, and removed it without irritation.

Q. You would consider it now a proper practice for a physician to do that.      A. Yes, sir. [296—249]

Q. What objection is there in the case I have called your attention to to the use of alcohol, if any?

A. It is similar, but slower in its solvent action on the adhesive plaster.



(Testimony of J. A. Sutherland.)

Mr. MARQUAM.—That is all.

Cross-examination.

(By Mr. ROTH.)

Q. But the alcohol does the work if you take a little more time?

A. It takes more time, and you have to rub it a little to get it off as a usual thing.

Q. You have used it successfully?

A. Yes, sir. I have used it frequently.

Q. Would you consider it proper practice to use chloroform where the fumes of the chloroform nauseated the patient and was particularly offensive to the patient, and even going to the extent of making the patient hysterical? Would you in that case consider the use of chloroform, as against the use of alcohol as good practice?

A. If my patient objected to having the chloroform used, I would certainly use some other method in removing it.

Q. It would be better to get it removed by some other method, even if it did take a little more time, wouldn't it? A. Yes.

Mr. ROTH.—That is all.

Redirect Examination.

(By Mr. MARQUAM.)

Q. Ether, as a matter of fact, has the same effect as far as inhaling it is concerned, as chloroform, that is, practically the same?

A. As far as its anesthetic qualities are concerned, only [297—250] it is slower in its action than

(Testimony of J. A. Sutherland.)

chloroform, but it will anesthetise the patient in the same way.

Q. I am talking about the ordinary effect upon the patient as far as putting them to sleep is concerned, and the smell is just as pungent?

A. It is more offensive to some, and chloroform is more offensive to others. It depends a good deal upon what the patient has been in the habit of taking, or has had to take.

Q. Suppose you had a wound which was deep seated, a deep cut, and very much inflamed and tender, you would avoid, if possible, any massage or manipulation or rubbing in that vicinity if you could.

A. I would avoid irritating the part as much as possible.

Q. If that wound had been dressed and adhesive tape placed over the dressing or in the immediate vicinity of that wound, and this rubber stuck upon the skin in the immediate vicinity of the wound, you would want to remove that with just as little friction and just as little manipulation as possible?

A. You mean the wound on the leg?

Q. No, assuming a wound on the neck, that is still sore and tender. You would want to remove the rubber from around that with as little manipulation as possible?

A. As gently as possible.

Mr. MARQUAM.—That is all.

Recross-examination.

(By Mr. ROTH.)

Q. You don't mean to say that you could not remove that gently with something else than chloroform or even ether?

(Testimony of J. A. Sutherland.)

A. I would remove it—as a usual thing—the straps, without either chloroform or ether. Just pull them off. [298—251]

Q. But after the straps are pulled off, and you want to remove the adhesive substance that sticks to the skin you could remove that generally without using either chloroform or ether, couldn't you?

A. Yes, you could remove it with alcohol.

Q. And you could remove it gently with alcohol, couldn't you, without disturbing the wound?

A. Yes. But as I say, you must take a longer time and a little more rubbing to get it off.

Q. But if you would saturate it with alcohol, for instance, put a little alcohol on there with cotton, soak it there a little while with alcohol, you wouldn't have any difficulty in getting it off, without rubbing that skin and without doing any injury, by taking a little time?

A. Yes, certainly, you can take it off, but it takes longer.

Mr. ROTH.—That is all.

Mr. MARQUAM.—That is all.

**[Testimony of Mrs. Stacia Rickert, for Plaintiff (in Rebuttal).]**

Mrs. STACIA RICKERT, a witness for plaintiff, in rebuttal, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. ROTH.)

Q. What is your name?      A. Stacia Rickert.

Q. You are the wife of Paul Rickert?      A. I am.



(Testimony of Mrs. Stacia Rickert.)

Q. Where do you reside?

A. On the outskirts of the town.

Q. On what street? A. Cushman. [299—252]

Q. Do you know Mrs. John Lappi? A. I do.

Q. And do you know Selma Lappi? A. I do.

Q. How close do you reside to where Mrs. Lappi resides?

A. I should judge about half a block, or a block.

Q. They are neighbors of yours? A. Yes, sir.

Q. Did you examine the scar on Selma Lappi's neck during the month of September, 1914?

A. I did.

Q. On what date?

A. On the 14th of September.

Q. Where was she when you made the examination? A. At Moyer's store.

Q. Just tell the jury how that scar was dressed, or the neck was dressed.

A. As near as I can remember, there was no dressing on it, only a white handkerchief and a little vaseline on it. I passed the remark, "Didn't Dr. Hall cut the other little tumor out," and she said, "No, he just cut this one out." I didn't see anything on there that I remember.

Q. Did you see the scar plainly? A. I did.

Q. And you examined the scar? A. Yes.

Mr. ROTH.—Cross-examine.

Cross-examination.

(By Mr. MARQUAM.)

Q. How do you fix the date? [300—253]

A. I bought a coat for the little Franklin girl who

(Testimony of Mrs. Stacia Rickert.)

was staying with me at that time and I have it down on my books.

Q. You fix that as the time you saw the little Lappi girl?

A. Yes. That was the first time that I saw her neck, was at Moyer's store.

Q. I take it from your manner of telling this, that you are not very sure so far as your remembering that there was no dressing on it?

A. I don't know of any dressing. All I remember of seeing was the handkerchief there.

Q. There was nothing at that time to call or direct your attention particularly as to how the wound was dressed?

A. The only thing was that I was surprised that it had healed up so rapidly.

Q. Who was with the child at that time?

A. Mrs. Lappi was.

Q. How did you examine the neck, or how did you examine the wound, what did you do? Tell us what you did when you looked at it.

A. I just went over to her, and pulled her handkerchief down and looked at the scar where the doctor operated on her.

Q. When was your attention first directed or called to the question of whether or not there were any bandages on that wound? A. When was the first?

Q. Yes. When were you first asked about this?

A. This morning. [301—254]

Q. You haven't have had any occasion to think about it from that day to this? A. No.

Q. The only think you were interested in at that

(Testimony of Mrs. Stacia Rickert.)

time was to see how the wound was healing.

A. No. I was interested, because I believe I was the first one that asked Mrs. Lappi to go to Doctor Hall and have the operation performed.

Q. Answer the question. The only thing that you were interested in at the time that you looked at this scar was to see how it was healing? That is what you were looking for?

A. Yes, to see how it was getting along.

Q. That is all the purpose you had in looking at that wound? A. Yes.

Q. Isn't it entirely possible that in looking at that wound that there could have been a dressing on there, a loose dressing, with something in the way of a little gauze there, that you could just pull aside and see the wound? A. No. There was no gauze.

Q. At that time that you took the handkerchief so that you could look under it?

A. There was no gauze, absolutely none.

Q. There was nothing but the naked handkerchief?

A. With a little vaseline on it.

Q. Nothing but the naked handkerchief?

A. That is all.

Q. Did you talk about it at the time, and remark upon there being nothing on it?

A. No. I simply said; "My, that has healed up wonderfully fast." [302—255]

Q. Was it healed up?

A. Yes, it was healing up fast.

Q. What did you see there?

A. I saw a scar with a little scab on it.



(Testimony of Mrs. Stacia Rickert.)

Q. How large was the scar?

A. I should judge about an inch or probably a little longer.

Q. How wide?      A. It was not very wide.

Q. How deep was that?

A. I couldn't tell you how deep it was.

Q. What did it look like, describe it in other respects?

A. It looked to me like it was a cut, had been cut and healed.

Q. Just in one place?      A. Yes.

Q. Had you seen it before?

A. I had seen it before she was operated on.

Q. Had you ever seen it since, except this one time?

A. Yes, I had seen it a number of times.

Q. Who did you first tell about this this morning?

A. I told Mrs. Lappi.

Q. What did Mrs. Lappi say when you asked her about it?

A. She asked me if I remembered how Selma's neck looked at the time I looked at it in Moyer's store.

Q. Did she tell you during this conversation what her testimony had been or what she had been trying to prove?      A. No.

Q. Didn't she tell you what she testified to or what Mr. Lappi testified to, or any other witnesses?

A. No. She asked me and I told her and she said, "That is all I want to know," and run out of the house.

Q. You had no occasion to remember this or to have it called to your attention since last September? [303—256]      A. No.

(Testimony of Mrs. Stacia Rickert.)

Q. The only thing that you were interested in then was to see that the wound was healing nicely?

A. Yes.

Q. And you thought back when she asked you about it, and based your opinion upon your clear recollection of what you saw then and not on anything that you have heard since?

A. No, it didn't. I wasn't. I didn't care about it any way, about anything at all. All I—(interrupted.)

Q. Pardon me. Are you in the habit of dealing at Moyer's? A. I have dealt there a few times.

Q. How do you fix this time you were there at the time you purchased your coat? Might not it have been some other time later?

A. No. That is the time. Because he had some hoods that came in, fascinators, we were trying them on, and little Selma Lappi wanted to try one of those hoods on, and that was how my attention was called to pulling her handkerchief down. He was fitting the hood on her, and I said, "Let me see your neck, Selma," and that was the same day—(interrupted).

Q. During that vicinity of time, or in that neighborhood of time, say within a week before or a week afterward or ten days afterward, you never had occasion to look at that again?

A. Yes, I was in her house.

Q. When?

A. About a week afterwards, and I observed her neck.

Q. I am talking about your examining the neck itself.

(Testimony of Mrs. Stacia Rickert.)

A. The neck itself was getting along splendid. Nice.

Q. Do you know just what date that was?

A. No, I don't know just what date that was. I have no occasion to know it, but I do feel that it was somewhere [304—257] along, a few days later or a week later, or something like that.

Q. It might have been two weeks later?

A. In fact I probably saw it two weeks later.

Mr. MARQUAM.—That is all.

Mr. ROTH.—That is all. The prosecution rests.  
Plaintiff rests.

(The Court takes a fifteen-minute recess, the jury in charge of the bailiffs, and after recess, the jury and the defendant being present, trial is resumed.)

**[Testimony of M. F. Hall, for Defendant (in Rebuttal).]**

M. F. HALL, defendant, called as a witness for defendant in rebuttal, heretofore sworn, testified:

**Direct Examination.**

(By Mr. MARQUAM.)

Q. I wish you would describe the dressing or whatever you did in treating this wound upon Selma Lappi's neck at the last time, or about the last time, the last couple of times, that you dressed it. Describe the size of the wound and the size of the dressing or tape that you used in making the dressing.

(Plaintiff objects as not rebuttal. Objection overruled.)

Q. Doctor, just state to start with, the size of that



(Testimony of M. F. Hall.)

wound if we may so call it, upon the neck of Selma Lappi that caused the scar that remains there or the wound that resulted from the operation.

A. The original, the first incision which I made in it was about half an inch long.

Q. I am talking about after the second operation.

A. After the second operation the incision was about an inch and three quarters or a little bit longer. At that time the distension was considerable as the skin was stretched by this growth, and as the thing healed up, and it [305—258] collapsed and the skin shrunk, and the wound healed the wound became somewhat shorter than that.

Q. Say, for instance, in the neighborhood of the 24th day of September, about what would be the size of the wound?

A. The size of the wound or the scar?

Q. When I refer to the wound I mean the scar.

A. The scar itself I should judge was about an inch or an inch and a quarter, maybe an inch and a half. I don't remember exactly.

Q. Describe to the jury as that wound healed where it would heal first

A. From the edges. It filled up from the bottom before any skin was allowed to grow across it, and it would heal from the edges. If the scar was a long one and gaping when it filled up from the bottom it would heal from both ends and the sides all towards the center. Sometimes one end of it would heal faster than another, as if there was infection or on account of the difference in circulation, there

(Testimony of M. F. Hall.)

the tissues would grow the least, and as it healed up the last point to be healed would be in the place of poorest circulation. And this wound as it healed it left—at the very last, in the lower part of the scar, was a place which healed last, and as I said before, the dressing on the 21st was a spot there about as large as the head of a pin, possibly a trifle larger than that. On that, at the time was the last dressing that I put on the time before that. The dressing had slipped, was on there but had slipped down and there was a dry scab, as the result of the drying of the exudations, and the thing which I was trying to prevent all the time was to try and prevent any scab from forming there, and keep a moist condition. At that time there was that little dry scab formed there, [306—259] and I lifted that up and removed it, and found pus underneath, and put on fresh dressings. These dressings were very small.

Q. What were the size of the dressings that you first used? Describe those to the jury. When you first put them on, what was the size of the dressings and how were they fastened on.

A. The first dressings after I began to use the adhesive, I put on first some gauze and a little cotton over that, and then usually a piece of oiled silk over that to keep the adhesive from sticking to any of those things, and it was put on by long strips which ran from the back of the neck that held that all on, including the bandages and all that; and it was necessary to put on the last dressings for absorbent purposes, but just enough dressing on there



(Testimony of M. F. Hall.)

to allow the wound to heal and to keep anything else from coming in contact with it. As the wound grew smaller, those dressings were smaller and cut in circular shape, and a piece of adhesive was cut round, in a circle, and the dressings slipped under one side of it up to the center, and when it was put on it was lapped over to the center and made a kind of conical shape, and the dressing stood up in a kind of conical shape.

Q. Tell the jury what the size of the last pieces of adhesive tape that you put upon the wound were.

A. It was a circular piece with a little bit of gauze about—well, less than—about as much gauze—it would be about the size—it was cut off the fringy part of the gauze so as to make the absorbent part and placed over the wound. It was about the size—the only thing I can think of to give you any idea of it after it was compressed together would be about the size of a number six [307—260] shot that you use in a shotgun. Just a little piece of the gauze. The gauze was cut from the edges so there was a slight thread, just slight threads of gauze. Those were laid over this wound to protect it and then a tiny slight piece of cotton just a slight shred and over that I put a piece of adhesive.

Q. How large was the piece of adhesive that you put over?

A. The piece of adhesive was I think about three-quarters of an inch in one direction and about half an inch in the other.



(Testimony of M. F. Hall.)

Q. After this was put on, did it cover the whole scar?

A. No. It covered this little spot that was left. The rest of it had healed over.

Q. A person looking at the wound when that last dressing was on, would it or would it not be possible, to see most of the scar upon the neck of the child?

A. They could have seen the larger part of the scar without seeing that part.

Q. Why was it necessary in treating this patient to keep a dressing of that kind that you have described on until it had thoroughly healed up?

A. To keep anything from coming in contact with any raw surface, in order to prevent friction, setting up inflammation by friction, or to prevent infection.

Q. As I understand you, at the last when it healed up the sore itself in which there might be danger of infection was about the size of a pin point. Just that little tiny spot left. The child wouldn't have been coming to the office to see me, and I wouldn't have had her come if there was not something to heal up.

Q. Which portion of this cut, that is, which part of the cut was the last to heal? [308—261]

A. It was on the lower part of the cut. That is where the circulation was poorest.

Mr. MARQUAM.—That is all.

Mr. ROTH.—That is all.

Mr. MARQUAM.—That is our case.

Testimony closed.

(Testimony of M. F. Hall.)

(The following occurred in the presence of, but not in the hearing of the jury, in open court.)

Mr. STEVENS.—The defendant now moves the Court to instruct the jury to find a verdict of not guilty for the reason that the testimony offered upon the part of the prosecution, and received by the Court, is wholly insufficient to constitute the offense in this case, for the reason that the testimony of the witness Selma Lappi has shown herself incompetent to be a witness; and for the further reason that the witness Charlotte Geis has shown herself to be incompetent as a witness herein, and that the matters and things testified to by her are not connected with this case, that the occurrences which she related upon the stand are too remote in time and otherwise wholly incompetent to show any design or intent or system of action upon the part of the defendant herein as to the matter and things alleged in the indictment against the defendant; and for the further reason that the Court erred in admitting Mrs. John Lappi to testify in this case that the said Selma Lappi made to her a complaint of the offense charged in the indictment; and for the further reason, as above stated, that the testimony is

Mr. STEVENS.—We except to the ruling of the insufficient to sustain a conviction. [309—262]

The COURT.—Which motion is denied.  
Court.

The COURT.—Exception allowed.

(The following proceedings were in the presence and hearing of the jury.) [310—263]

[**Certificate of Court Reporter to Transcript of  
Testimony and Proceedings.**]

United States of America,  
Territory of Alaska,—ss.

I, E. T. Wolcott, official court reporter of the District Court of the Territory of Alaska for the Fourth Judicial Division, do hereby certify; That in the month of April, 1915, I took down in shorthand the testimony given and proceedings had at the trial of the case of the United States of America, plaintiff, vs. M. F. Hall, defendant, numbered 689 in the records of the clerk of said court; and that the typewritten pages hereunto annexed and numbered from 1 to 263 both inclusive comprise a full, true and correct statement of all the testimony given and proceedings had in the trial of said case from the beginning of the introduction of the testimony up to and including the closing of the testimony; that it also comprises a summary of certain proceedings had before the introduction of any testimony in said cause, but does not contain any of the proceedings had in empaneling the jury.

Dated May 31, 1915.

E. T. WOLCOTT,  
Official Court Reporter, District Court Territory of  
Alaska, Fourth Judicial Division. [311]

[Caption and Title.]

**Instructions.**

**GENTLEMEN OF THE JURY:**

The defendant M. F. Hall is indicted by the Grand



Jury, and is now on trial before you for the crime of assault. The indictment charges that the said M. F. Hall, on the 24th day of September, A. D. 1914, at the town of Fairbanks, in the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, and within the jurisdiction of this court, not being armed with a dangerous weapon, did then and there unlawfully assault one Selma Lappi by then and there unfastening some of the underclothing of the said Selma Lappi and then and there placing his hand upon the private parts of the body of the said Selma Lappi, the said Selma Lappi being then and there a female child of the age of nine years and he, the said M. F. Hall, being then and there a male person over the age of twenty-one years.

1.

The defendant has entered a plea of not guilty in this case; and you are instructed that such plea controverts and denies each and every material allegation of the indictment, and places the burden upon the Government of providing each such material allegation beyond a reasonable doubt.

2.

You are instructed that section 1905 of the Compiled [312] Laws of Alaska defines assault to be that whoever, not being armed with a dangerous weapon, unlawfully assaults or threatens another in a menacing manner, or unlawfully strikes or wounds another.

3.

You are instructed that the indictment is a mere accusation and is not in itself evidence of the de-

fendant's guilt; and the defendant is presumed to be innocent until his guilt is established to your satisfaction beyond a reasonable doubt, and such presumption of innocence accompanies the defendant throughout the trial until his guilt is so established.

## 4.

You are instructed that in a criminal case, the Judge and jury of this court have important, though separate, functions to perform.

It is your duty to hear all the evidence, all of which is addressed to you, and to decide thereupon all questions of fact. It is the duty of the Judge of this court, on the other hand, to instruct you upon the law applicable to the facts and evidence in this case, and the statute makes it your duty to accept as law what is laid down as such by the Court in these instructions.

## 5.

You are instructed that an assault may be committed without inflicting any personal injury.

An intent to do violence is an essential ingredient to the offense; but the degree of violence, of course, is immaterial.

The wrongful and unlawful touching of the person of another is an assault.

## 6.

You are instructed that the term "reasonable doubt," as defined by the law and used in these instructions, is that state of the case which, after a careful comparison and consideration of all the evidence in the case, leaves the minds of the [313] jury in that condition that they cannot feel an abid-

ing conviction, to a moral certainty, of the truth of the charge.

The term “reasonable doubt” does not mean any doubt; but such doubt must be actual and substantial, as contra distinguished from mere vague apprehension, and must arise out of the evidence, or from a want of evidence, or from both such sources.

A reasonable doubt is not a mere whim, but is such a doubt as arises from a careful and honest consideration of all the evidence, or lack of evidence, in the case; and the evidence is sufficient to remove all reasonable doubt when it convinces the judgment of ordinarily prudent men of the truth of a proposition with such force that they would act upon the conviction without hesitation in their own most important affairs of life.

7.

The defendant is presumed to be innocent of the charge against him until he is proven guilty beyond a reasonable doubt by the evidence produced in this case and submitted to you. This presumption of innocence is a right guaranteed to the defendant by the law and remains with him and should be given full force and effect by you until such time in the progress of this case as you are satisfied of his guilt from the evidence beyond a reasonable doubt.

8.

You should not consider any evidence sought to be introduced but excluded by the court, nor should you consider any evidence that has been stricken by the Court from the record, nor should you take into



account in making up your verdict any knowledge or information known to you not derived from the evidence given upon the witness-stand.

## 9.

You are instructed that you are the sole judges of all questions of fact, and of the effect of the evidence, and the weight to be given to the testimony of the witnesses; but your [314] power in this respect is not arbitrary, but is to be exercised by you with legal discretion and in subordination to the rules of evidence laid down in these instructions;

## 10.

In considering the evidence in this case, you are not bound to find a verdict in conformity with the declarations or testimony of any number of witnesses, when their evidence does not produce conviction, in your minds, against a lesser number of witnesses or other evidence which is satisfying to your minds.

## 11.

If you find that any witness has wilfully testified falsely in one part of his testimony in this case, you may distrust any part, or all, of the testimony of such witness. And, if you believe from the evidence that any witness appearing before you in this case has wilfully testified falsely, you are at liberty to reject the entire testimony of such witness; but you are not bound to reject the entire testimony of a witness because he has testified falsely in some part of his testimony; you should reject the false part, and should give to the other parts such weight as you may deem they are justly entitled to receive.

You should not fail to weigh and consider fairly and give proper effect to all testimony which you consider truthful.

## 12.

In determining the credit you will give to a witness, you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial, the motive he has in testifying, if any is shown; his relation to or feeling for or against the defendant; the probability or improbability of such witness's statements, and the opportunity he had to observe and to be informed as to the matters respecting which he gave testimony before you; and the [315] inclination he evinced, in your judgment, to speak the truth or otherwise as to matters within the knowledge of such witness. It is your duty to give the testimony of each and all of the witnesses such credit as you consider their testimony justly entitled to receive.

## 13.

You are instructed that evidence is to be estimated not only by its intrinsic weight, but also according to the evidence which it is within the power of the one side to produce, and of the other to contradict; and, therefore, if the weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party offering the same, the evidence so offered should be viewed with distrust.

## 14.

You are instructed that, as a matter of law, when



the defendant testified as a witness in this case, he became as any other witness, and his credibility is to be tested and subjected to the same tests as are applied to any other witness. And, in determining the degree of credibility that shall be accorded to his testimony, you have a right to take into consideration the fact that he is interested in the result of the prosecution, as well as his demeanor and conduct upon the witness-stand during the trial, and you may also take into consideration the fact, if such be the fact,—that he has been contradicted by other witnesses. And you are further instructed, that if, after considering all the evidence in the case, you find that the defendant has wilfully and wrongfully testified falsely to any fact material to the issue in the case, you have the right to entirely disregard his testimony, except so far as his testimony is corroborated by other credible testimony.

## 15.

You are further instructed that there has been testimony given in this case on the part of the prosecution,—testimony [316] of girls of tender age, and of course you should give such weight to their evidence as in your judgment it is worth. In weighing their testimony so as to determine its reliability, you should apply to it the same tests that you do to other witnesses, and, in addition thereto, you should recall their youth and the extreme liability of children to repeat what they have heard if they have been talked to about this matter concerning which they testified. But the whole matter,—the whole question, as to what weight their testimony should receive, is



in your hands, bearing in mind these observations I have made.

## 16.

The jury are instructed that all the evidence in this case relative to the defendant and Charlotte Geis was admitted by the Court for only one purpose, and that was its bearing upon the question of the intent of the defendant regarding the acts charged in the indictment, and its consideration by the jury must be strictly limited to that purpose. It is a cardinal principal in criminal law, that a defendant cannot be convicted of one crime upon proof that at some former time he committed a similar crime.

You are instructed that unless you believe beyond all reasonable doubt from the evidence in this case, exclusive of the evidence regarding Charlotte Geis, that the defendant, at the time and place charged in the indictment, placed his hand upon the private parts of the child Selma Lappi, then you should acquit the defendant without taking into consideration the testimony concerning Charlotte Geis, or allowing it to affect your judgment. But if, from the evidence in this case, exclusive of that concerning the said Charlotte Geis, you believe beyond all reasonable doubt that the defendant at the time and place charged in the indictment placed his hand upon the private parts of the said Selma Lappi, but are in doubt whether the defendant at the time entertained [317] a criminal intent or not, in order to determine the question of intent, you may consider the testimony concerning the said Charlotte Geis, and not otherwise.

And in this connection you are further instructed

that under no circumstances should you consider the evidence concerning Charlotte Geis, nor allow it in any way to affect your judgment or verdict, unless you believe beyond all reasonable doubt that the charges made against the defendant are true, and that the defendant unlawfully assaulted her.

17.

In considering the testimony introduced in this case, you are instructed that you must proceed in the following manner;

First. You will eliminate from your consideration all testimony of the witness Charlotte Geis. Having so done, you will determine, from the testimony offered and introduced, whether or not the defendant committed the act charged in the indictment, in the manner and form as therein alleged, beyond a reasonable doubt. For this purpose, the testimony of the witness Charlotte Geis can be of no avail; and the same must be entirely eliminated from your consideration.

Second. If you find that the defendant did commit the assault as alleged in the indictment, beyond a reasonable doubt, then you may consider the testimony of the witness Charlotte Geis for one purpose only,—to determine whether or not her testimony beyond a reasonable doubt, proves a criminal intent on the part of the defendant, existing in his mind at the time of the assault testified to by the witness Charlotte Geis, which intent or design, abiding in the mind of the defendant, again found expression by committing an assault on Selma Lappi on the 24th day of September, 1914. The defendant is not on trial for com-



mitting an assault on Charlotte Geis; and her testimony must be considered by you only for the purpose heretofore stated.

## 18.

You are instructed that, in order to convict the defendant [318] in manner and form as he stands indicted, it is necessary for the Government to satisfy you, beyond a reasonable doubt not only that the assault upon Selma Lappi was actually committed but at the time of the alleged assault there was, beyond a reasonable doubt, an intent on the part of the defendant to commit the unlawful act charged in the indictment.

## 19.

I further instruct you, gentlemen of the jury, and caution you against conviction from prejudice or insufficient evidence. Unless you are satisfied from the evidence beyond a reasonable doubt of the guilt of the accused, you should render a verdict of not guilty, however strong may be your prejudice, if you have any.

## 20.

The jury are further instructed that the presumption of innocence is not a mere form of words that may be disregarded by the jury at pleasure, but it is an essential, substantial part of the law of the land and binding on the jury in this case. And it is the duty of the jury to give the defendant the full benefit of this presumption and to acquit the defendant unless the evidence in the case convinces you of his guilt as charged, beyond all reasonable doubt.

## 21.

You are further instructed that where two conclu-



sions can be drawn from a single circumstance, one tending to establish guilt, and the other tending towards the innocence of the accused, the law makes it your duty to accept the conclusion tending towards innocence rather than the one tending towards guilt.

## 22.

Your duty to society and to this defendant obligates each of you to give your earnest and careful attention to every [319] feature of the case now on trial before you, so that the defendant may not be unjustly convicted nor wrongfully acquitted.

Under the solemnity of your oaths as jurors, you must consider all of the evidence in the case, under the instructions of the Court, and upon the law and the evidence you must reach, if you can, a just verdict, which the law and the rights of this defendant demand of you. And, in determining the guilt or innocence of the defendant under the evidence, it becomes your duty to accept the law of the case as laid down in these instructions.

## 23.

You are finally instructed, gentlemen of the jury, that since you are the sole judges of what facts have been proven on the trial, you should not permit the remarks or expressions of opinion by counsel to influence your judgment, except as the same conform to the facts proven or are reasonably deducible from such facts and the law of the case as laid down in these instructions.

## 24.

The jury should agree on a verdict. No juror from mere pride of opinion hastily formed or expressed should refuse to agree, nor on the other hand

should he surrender any conscientious views founded on the evidence. It is the duty of each juror to reason with his fellows concerning the facts, with an honest desire to arrive at the truth, and with a view of arriving at a verdict. It should be the object of all the jury to arrive at a common conclusion, and to that end to deliberate together with calmness. It is your duty to agree upon a verdict if that be possible without a violation of conscientious convictions.

## 25.

You are instructed that the term "private parts" as charged in the indictment refer to and means sexual organs. [320]

In conformity with the law I have prepared two forms of verdict which you will take with you to your jury room, and, when you shall have unanimously agreed upon a verdict in this case, you will sign, by your foreman, that form upon which you shall have agreed, and return it into court as your verdict, and you will destroy the other form. The forms of verdict are: guilty as charged in the indictment, and not guilty.

With these forms, I hand you the written instructions which have just been read to you by the Court, for your guidance, also the indictment, both of which you will return into court with your verdict.

Dated April 22d, 1915.

CHARLES E. BUNNELL,  
District Judge.

[Indorsed]: April 22, 1915. [321]



## [Caption and Title.]

**Exceptions to Instructions Given by the Court.**

The defendant excepts to instruction number 14 of the charge of the Court to the jury and the whole thereof, for the reasons:

(I) That said instruction singles out the defendant as a witness from all the other witnesses testifying in said case and comments to the jury upon the evidence of said defendant as a witness in a way that calls particular attention to the said defendant as such witness.

(II) That the Court tells the jury in said instruction that they are to consider in effect that they are to apply a different standard for weighing and determining the credibility of such witness, and of determining whether or not they will disregard his whole evidence, provided they believe him to have testified falsely in any material matter, than they apply to other witnesses in the case.

(III) That said instruction is inconsistent with instruction number II of said charge, for the reason that instruction number II the jury are told that if they believe from the evidence that any witness appearing before them has wilfully testified falsely they are at liberty to reject the entire testimony of such witness; but they are not bound to reject the entire testimony of such witness because he has testified falsely in some parts of his testimony, but they are further told that they should give to the parts such weight as they may deem they are justly entitled [322] to receive. In instruction number 14, however, the jury are instructed that if “after



considering all the evidence in the case you find that the defendant has wilfully and wrongfully testified falsely to any fact material to the issue in the case, you have a right to entirely disregard his testimony except in so far as his testimony is corroborated by other creditable testimony.”

(IV) That said instruction number 14 not only gives the jury a different standard by which to determine whether or not they shall disregard all the defendant's testimony, if they believe him to have testified falsely in any material matters than that to be used in determining the same question regarding the testimony of other witnesses; but said instruction numbr 14 is calculated to lead the jury by reason of the special comments of the Court upon the testimony of the defendant to believe that the Court thinks and considers the testimony of the defendant untruthful in regard to some material matters testified to by him.

The defendant excepts to the instructions as a whole, as read to the jury, for the reason that nowhere in said instructions are the jury correctly informed and instructed as to the exact nature of the charge for which the defendant is on trial, especially in view of the testimony offered.

MORTON E. STEVENS,

T. A. MARQUAM,

LEROY TOZIER,

Attorneys for Defendant.

The foregoing exceptions to instructions, taken in open court, in the presence of the jury, and before

the jury retired for deliberation, are allowed.

CHARLES E. BUNNELL,  
District Judge.

[Indorsed]: Filed April 24, 1915. [323]

[Caption and Title.]

**Motion in Arrest of Judgment.**

Comes now the defendant above named, and moves the Court for an order that no judgment be rendered against the defendant herein upon the verdict of guilty returned by the jury against him upon the 22d day of April, 1915, notwithstanding said verdict, upon the ground and for the reason that the judgment herein does not state facts sufficient to constitute a crime, as is more fully and particularly set forth in the demurrer to said indictment filed herein, to which reference is hereby made and made a part of this motion.

T. A. MARQUAM,  
MORTON E. STEVENS,  
LEROY TOZIER,

Attorneys for Defendant.

Service of the foregoing motion admitted and a true copy thereof received this 24th day of April, 1915.

H. E. PRATT,  
Attorney for Plaintiff.

[Indorsed]: Filed April 24, 1915. [324]

[Caption and Title.]

**Motion for a New Trial.**

Comes now the defendant in the above-entitled action and moves the Court to set aside the verdict of



“Guilty” rendered herein against the defendant, upon the 22d day of April, 1915, and grant a new trial herein for the following reasons:

First. Misconduct of the United States Attorney in his address to the jury in this case by using the following language:

“I believe that if there was ever a case proven beyond a reasonable doubt and to an absolute mathematical certainty, this is the one.”

and later in said argument by the use of the following language in his address to the jury:

“Do you want to feed the babies of this community into the jaws of Doctor Hall?”

For the reasons that the language of the prosecuting attorney first above quoted, is improper in any criminal case, and for the further reason that the language last above quoted is improper under the circumstances in this case; not based upon any evidence or reasonably deducible therefrom, and is calculated to inflame *the* prejudice the minds of the jury, and by reason of said language upon the part of the said prosecuting attorney, the defendant was prevented from having a fair trial.

Second. Error of law occurring at the trial and excepted to by the defendant in the admission of evidence, to wit:

For the error of the Court in overruling the defendant's objection to the admission of the testimony of Charlotte [325] Geis, which *tendered* to show the defendant guilty of another and separate offense, wholly independent and distinct from the offense for which he was then on trial; for the reason that the same was incompetent, immaterial and wholly inad-



missible for any purpose, or upon any correct theory applicable to this case; said alleged offense testified to by the said Charlotte Geis having occurred some thirty-four months prior to the time of the offense alleged in the indictment, and to the admitting such evidence, the defendant duly excepted.

Third. For the error of the Court in his ruling upon the motion of defendant to strike out all the testimony of Charlotte Geis in this case relative to such prior and independent offense; which motion the defendant was overruled by the Court and to which ruling the defendant then and there excepted.

Fourth. For the error of the Court in giving and reading to the jury instruction number 14 of its charge to the jury, for the reasons set out in the exception to said instruction, which exception to said instruction was allowed by the Court.

Fifth. For the reason that because of said errors of law occurring at the trial and excepted to by the defendant, and which more fully appears in the shorthand notes taken at said trial, the defendant herein was prevented from having a fair and impartial trial.

(Signed) T. A. MARQUAM,

(Signed) MORTON E. STEVENS,

(Signed) LEROY TOZIER,

Attorneys for Defendant. [326]

Service of the foregoing motion for a new trial admitted and a true copy thereof received this 24th day of April, 1915.

H. E. PRATT,

Attorney for Plaintiff.

[Indorsed]: Filed April 24, 1915. [327]

[Caption and Title.]

**Certificate to Bill of Exceptions.**

United States of America,

Territory of Alaska,—ss.

I, the undersigned, presiding Judge at the trial of the above-entitled action, do hereby certify that the above and foregoing contains a full, true and accurate transcript of all the testimony adduced and heard at the trial thereof on the issues joined, with the objections and exceptions of said defendant to the reception and rejection of evidence, the typewritten charge of the Court to the jury and the exceptions to instruction No. 14 taken by the defendant, the motions in arrest of judgment and for a new trial, and all other matters and things occurring thereat and not otherwise of record.

And I now sign and allow the same as and for a true and correct bill of exceptions of all matters contained therein, and order the same to be refiled by the clerk of this court, and when so filed, to be and become part of the record in this cause.

Dated at Fairbanks, Alaska, this 5th day of October, 1915.

CHARLES E. BUNNELL,

District Judge.

Entered in Court Journal No. 13, page 270.

[Indorsed]: Filed October 5, 1915. [328]

[Caption and Title.]

**Assignment of Errors on Writ of Error.**

The defendant below and plaintiff in error, in this action, in connection with his petition for a writ of error, makes the following assignment of errors which he avers occurred upon trial of the action, to wit:

I.

The Court erred in admitting the evidence of the witness Charlotte Geis who testified that she visited the offices of the defendant about thirty-four months before the offense alleged in the indictment herein and that the defendant committed then and there an assault upon her person in the same way and manner as that alleged in the indictment herein to have been committed upon the person of Selma Lappi, the complaining witness herein, by taking the said Charlotte Geis upon his lap and placing his hand upon her sexual organs, and in particular that part of the evidence of the said Charlotte Geis, as follows:

to the introduction of which evidence defendant duly objected and the Court overruled the objection whereupon defendant duly excepted and exception was allowed by the Court.

II.

The Court erred in denying the motion of defendant made at the close of the testimony of said Charlotte Geis, to strike out all the testimony of the said witness relating to a prior and independent alleged offense committed upon the said Charlotte Geis,



similar to the offense alleged in the indictment herein, which [329] motion being by the Court denied, was duly excepted to as to said denial, by the defendant and exception allowed by the Court.

### III.

That the Court erred in giving and reading to the jury instruction numbered fourteen, as follows:

#### 14.

You are instructed that, as a matter of law, when the defendant testified as a witness in this case, he became as any other witness, and his credibility is to be tested and subjected to his testimony, you have a right to take into consideration the fact that he is interested in the result of the prosecution, as well as his demeanor and conduct upon the witness stand during the trial, and you may also take into consideration the fact,—if such be the fact,—that he has been contradicted by other witnesses. And you are further instructed that if, after considering all the evidence in the case, you find that the defendant has wilfully and wrongfully testified falsely to any fact material to the issue in the case, you have the right to entirely disregard his testimony, except so far as his testimony is corroborated by other credible testimony.

which instruction was duly excepted to by defendant, and exception allowed by the court.

### IV.

The Court erred in denying the motion of defendant in arrest of judgment, to which denial defendant

duly excepted and exception allowed by the Court.

V.

The Court erred in denying the motion for a new trial duly made by defendant, to which denial the defendant duly excepted and exception allowed by the Court. [330]

VI.

The Court erred in pronouncing sentence and rendering judgment against the defendant.

Wherefore the defendant below and plaintiff in error prays that the judgment of the District Court may be reversed.

LEROY TOZIER,

Attorney for Defendant.

Service of a copy of within assignment of errors is admitted this 31st day of May, 1915.

R. F. ROTH,

District Attorney.

[Indorsed]: Filed May 31, 1915. [331]

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[Caption and Title.]

General, March, 1915, Term. September 30, 1915.

One Hundred First Court Day.

**Order Granting Permission to File Amended  
Assignment of Errors.**

Now, at this time, R. F. Roth appearing for and on behalf of the Government and Leroy Tozier appearing for and on behalf of the defendant, upon request of counsel for defendant that he be permitted by the Court to file herein his amended assignment of errors on writ of error, and the Court having

heard counsel for the respective parties herein, and having considered and being fully advised in the premises,

IT IS ORDERED that counsel for defendant be, and he is hereby permitted to file herein his amended assignment of errors an writ of error.

CHARLES E. BUNNELL,  
District Judge.

CLERK'S NOTE: Counsel for Government notes an exception, which exception is allowed.

Entered in Court Journal No. 13, page 265. [332]

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[Caption and Title.]

**Amended Assignment of Errors on Writ of Error.**

The defendant below and plaintiff in error, in this action, in connection with his petition for a writ of error, makes the following assignment of errors which he avers occurred upon trial of the action, to wit:

I.

The Court erred in admitting the evidence of the witness Charlotte Geis who testified that she visited the offices of the defendant about thirty-four months before the offense alleged in the indictment herein and that defendant committed then and there an assault upon her person in the same way and manner as that alleged in the indictment herein to have been committed upon the person of Selma Lappi the complaining witness therein, by taking the said Charlotte Geis upon his lap and placing his hand upon her sexual organs, and in particular that part of the



evidence of the said Charlotte Geis, as follows:

“Q. How did you happen to go to Dr. Hall’s office that time Charlotte?

A. I went—(cries)—I went with my brother when he had a cut.

Q. Where was your brother cut, Charlotte?

A. (No answer, witness crying.)

Mr. STEVENS.—The defendant objects to the question and the testimony of this witness, first, for the reason that the witness has not shown herself to be competent to appreciate the obligation of an oath; second, that the testimony is immaterial, irrelevant, incompetent, and impertinent for any purpose, as it does not appear that Selma Lappi was present [333] at the time or any other person except Dr. Hall and the brother Charles; the time is not definitely fixed, and there can be no object in the testimony to be conceived by the defendant at this time, excepting an attempt on the part of the prosecution to prejudice the minds of the jury by offering some testimony that is wholly improper. I can only anticipate the object at this time. Certainly the question he asks, whether preliminary or not, is subject to the objection that I have just made.

(The objection was overruled by the Court, and the defendant reserves an exception, which exception is allowed.)

Mr. ROTH.—Q. What was the matter with Charlie at that time?

A. He had a cut in the forehead.

Q. Did you leave Dr. Hall’s office when Charles left?      A. No.

Q. How did you come to not leave?

Mr. STEVENS.—We object for the reason made to the question last objected to, and for the further reason that *not* testimony of the nature sought to be given by this witness is competent, for the reason that any conduct, whether proper conduct or improper conduct, upon the part of Dr. Hall towards this child, is wholly inadmissible under the laws, being a different person from that alleged in the indictment; for the further reason that the testimony is too remote, and there has been no showing upon the part of the Government that it is connected directly or indirectly with the offense charged in the indictment.

The COURT.—What is the purpose of the testimony, Mr. Roth?

Mr. ROTH.—The purpose of the testimony—(interrupted).

Mr. MARQUAM.—We object unless it appears to the Court that it is clearly admissible, we object to counsel stating the purpose of it in the presence of the jury, for the damage is done if counsel makes the statement. [334]

The COURT.—Objection overruled. (Defendant saves an exception, which exception is allowed.)

Mr. ROTH.—Q. How did you come not to leave Dr. Hall's office when Charles left?

A. I was sitting in his lap, in Dr. Hall's lap—(interrupted).

M. STEVENS.—We desire to be understood that our same objections go to all this testimony.

The COURT.—For the reasons heretofore assigned?

Mr. STEVENS.—Yes. And we desire an exception to the ruling of the Court allowing it to go on.

Mr. ROTH.—For the purpose of obviating the necessity of interrupting the witness, the prosecution is willing to stipulate that the objections heretofore made to the questions is made to all of the testimony to be given by this witness, and that an exception is taken and an exception allowed.

The COURT.—Very well.

Mr. ROTH.—Q. You just stated that you were sitting in Dr. Hall's lap. What did Dr. Hall say?

A. When my brother went, he said, "Sister are you coming?"

Q. Yes, all right.

A. And the doctor said, "No, she is going to stay here a little while."

Q. All right, then, did your brother go away?

A. Yes.

Q. Was the office door open or was it shut, after your— A. I think it was shut.

Q. What kind of underclothes did you have on?

A. I didn't have any on.

Q. What kind of clothes were you wearing at that time? A. Bloomers.

Q. How were the bloomers fastened around the legs here (indicating). [335] A. With elastic.

Q. What did Dr. Hall do after your brother left?

A. Put his hand up under my bloomers.

Q. Where did he put his hand, Charlotte? Did he put it up here (indicating). A. Yes.



Mr. MARQUAM.—We object to that and wish the record that at the time counsel is asking the question he is going through motions with his hands and indicating (interrupted).

The COURT.—Objection sustained.

Mr. MARQUAM.—We ask that counsel be warned not to repeat a performance of that kind.

The COURT.—Of course, Mr. Roth, you will not illustrate what the child may testify to. You should be governed entirely by what the answer of the child is.

Mr. ROTH.—It is extremely difficult to require a child to mention names. That was why I put the question the way I did.

Mr. STEVENS.—And that was wholly improper.

Mr. ROTH.—Q. Where did Dr. Hall put his hand when he put it up under your bloomers?

A. He put it on—

Q. Tell us where he put his hand.

A. Put it right down here (indicating).

Q. Did he do anything with his finger?

A. Yes. (Cries.)

Q. Where did he put his finger?

A. Right here (indicating)—(cries).

Q. Did he put it inside? A. Yes.

Q. Charlotte, let me ask you this question. What did he do with his finger after he put it inside?

[336]

A. Around like this (showing).

Q. Did he say anything to you? A. No.

Q. After that what did he do, Charlotte?

A. Nothing.

Q. How long did you stay there?

A. Not very long.

Q. Did Dr. Hall say anything to you at all?

A. I don't remember of him ever saying a thing.

Q. Was Dr. Hall treating you at that time for anything? A. Yes, I had—no.

Q. Had he treated you before?

A. Not for any other thing. but one time I had a sty on my eye and he fixed that.

Q. How long before? A. I don't remember.

Q. But at this time that you went there with Charles, was Dr. Hall treating you at that time?

A. No.

Mr. ROTH.—You may cross-examine.

#### Cross-examination.

By Mr. MARQUAM.—At this time we move that all the testimony of the witness Charlotte Geis be stricken for the reason that the same is irrelevant, incompetent and immaterial, and neither tending to prove or disprove any element of the offense charged, and is not shown to have happened within such time as could throw any light upon any element of the offense charged, and is in no way connected with this case."

(The motion is denied. Defendant saves an exception, which exception is allowed.)

#### II.

The Court erred in denying the motion of defendant made [337] at the close of the testimony of said Charlotte Geis, to strike out all the testimony of the said witness relating to a prior and independ-

ent alleged offense committed upon the said Charlotte Geis, similar to the offense alleged in the indictment herein, which motion being by the court denied was duly excepted to as to said denial, by the defendant and exception allowed by the Court.

### III.

That the Court erred in giving and reading to the jury instruction numbered fourteen, as follows:

#### 14.

You are instructed that, as a matter of law, when the defendant testified as a witness in this case, he became as any other witness, and his credibility is to be tested and subjected to the same tests as are applied to any other witness. And, in determining the degree of credibility that shall be accorded to his testimony, you have a right to take into consideration the fact that he is interested in the result of the prosecution, as well as his demeanor and conduct upon the witness-stand during the trial, and you may also take into consideration the fact—if such be the fact—that he has been contradicted by other witnesses. And you are further instructed that if, after considering all the evidence in the case, you find that the defendant has willfully and wrongfully testified falsely to any fact material to the issue in the case, you have the right to entirely disregard his testimony, except so far as his testimony is corroborated by other credible testimony.

### IV.

The Court erred in denying the motion of defend-



ant in arrest of judgment, to which denial defendant duly excepted and exception allowed by the Court.

## V.

The Court erred in denying the motion for a new trial duly made by defendant, to which denial the defendant duly excepted [338] and exception allowed by the Court.

## VI.

The Court erred in pronouncing sentence and rendering judgment against the defendant.

WHEREFORE the defendant below and plaintiff in error prays that the judgment of the District Court may be reversed.

LEROY TOZIER,

Attorney for Defendant.

Service of a copy of the within assignment of errors is admitted this 30th day of September, 1915.

R. F. ROTH,

United States District Attorney.

[Indorsed]: Filed September 30, 1915. [339]

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[Caption and Title.]

**Notice of Application for Extension of Time.**

R. F. ROTH, United States District Attorney, Territory of Alaska, Fourth Judicial Division,

TAKE NOTICE that the defendant herein will on Friday the 28th day of May, 1915, at the hour of 2 o'clock P. M. in the courtroom of the District Court, of the Fourth Judicial Division, of the Territory of Alaska, in the town of Fairbanks, move the Court for an order extending the time of the defendant herein,

within which to prepare, file, sue out and serve this writ of error, to file his supersedeas bond, to secure the issuance and service of citation, and to otherwise perfect his procedure herein, to the 10th day of June, 1915, including said day, and will at said time, move said Court for an order staying execution and proceeding upon the judgment entered in this cause until the said 10th day of June, 1915.

LEROY TOZIER,

Attorney for Defendant.

Leave is hereby given, shortening the time for the return of said notice until 2 o'clock of the 28th day of May, 1915.

Dated at Fairbanks, Alaska, this 27th day of May, 1915.

CHARLES E. BUNNELL,

Judge.

Service of a true copy is hereby admitted this 27th day of May, 1915.

R. F. ROTH,

U. S. Dist. Atty.

[Indorsed]: Filed May 27, 1915. [340]

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[Caption and Title.]

General March, 1915, Term. Friday, May 28, 1915.

Seventy-sixth Court Day.

**Order Extending Time [to May 31, 1915, to File  
Petition for Writ of Error, etc.]**

Now, on this day, came on for hearing defendant's application for extension of time, R. F. Roth, United States Attorney, appearing in behalf of plaintiff, Leroy Tozier in behalf of defendant; after argument

thereon by the respective attorneys, M. F. Hall, the defendant herein, was duly sworn and testified in matter of application of extension of time; and the Court being fully and duly advised in the premises;

Ordered, that a further extension of time within which to prepare and file a petition for writ of error, and such other instruments as may be necessary up to the point of making application for appeal bond, be given defendant until Monday, May 31, 1915, at 10:00 o'clock A. M., the defendant in the meantime to be required to report at the United States Marshal's office, at Fairbanks, Alaska, at 10:00 o'clock each morning until said time.

CHARLES E. BUNNELL,

District Judge.

Entered in Court Journal No. 13, page 181. [341]

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[Caption and Title.]

General March, 1915, Term. Monday, May 31, 1915.

Seventy-eighth Court Day.

**Order Extending Time to [4 P. M. May 31, 1915, in  
re Petition for Writ of Error.]**

Now on this day, on motion of Leroy Tozier, attorney for defendant, R. F. Roth, United States Attorney, consenting thereto,

IT IS ORDERED that a further extension of time be granted defendant herein until 4:00 P. M. this day, in the matter of the petition for writ of error.

CHARLES E. BUNNELL,

District Judge.

Entered in Court Journal No. 13, page 184. [342]



[Caption and Title.]

**Petition for Writ of Error [and Order of Allowance].**

To the Honorable Justices of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and the Honorable CHARLES E. BUNNELL, Judge of the District Court for the Territory of Alaska, Fourth Judicial Division.

Comes now M. F. Hall, defendant below and plaintiff in error, and complains that in the record and proceedings had in the said action, and also in the rendition of the sentence and judgment in the above-entitled action in the said District Court, at the March term, 1915, thereof against the said defendant below and plaintiff in error, M. F. Hall, on the 18th day of May, 1915, manifest error having happened to the great damage of the said defendant below and plaintiff in error, whereof the said defendant below and plaintiff in error prays the Honorable Judges for the allowance of a writ of error, and for an order fixing the amount of bond to cover costs and damages in the said action, and for such other orders and processes as may cause the same to be corrected by the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated the 31st day of May, 1915.

LEROY TOZIER,

Attorney for Defendant Below and Plaintiff in Error.

Allowed:

CHARLES E. BUNNELL,

Judge. [343]

[Indorsed]: Filed May 31, 1915. [344]

[Caption and Title.]

General March, 1915, Term. Monday, May 31, 1915.  
Seventy-eighty Court Day.

**Order Allowing Petition for Writ of Error.**

Now, on this day, the defendant's petition for writ of error having been duly filed in said cause, said petition was allowed by the Court.

CHARLES E. BUNNELL,

District Judge.

Entered in Court Journal No. 13, page 185. [345]

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[Caption and Title.]

**Order Allowing Writ of Error and Fixing Amount of Bond.**

The said defendant in the court below and plaintiff in error, having this day filed his petition for a writ of error from the decision and judgment thereon made and entered herein, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, together with an Assignment of Errors within due time, and also praying that an order be made fixing the amount of security which the defendant below and plaintiff in error should give and furnish upon said writ of error, and that upon the giving of said security, all further proceedings of this court be suspended and stayed until the determination of said writ of error by said Circuit Court of Appeals, and said petition having this day been duly allowed;

Now, therefore, it is ORDERED, that upon the

said defendant below and plaintiff in error filing with the clerk of this court a good and sufficient bond in the sum of one thousand five hundred dollars, to the effect that said defendant below and plaintiff in error will abide by and perform the orders and judgments of the said appellate court, and on his failure so to do that the signers of the said bond will pay to the United States of America the said sum above mentioned, which bond shall in all respects conform to the requirements of chapter twenty-two, Code of Criminal Procedure, Compiled Laws of Alaska, 1912, and in particular to section 2325, of said compiled laws, which said bond shall be approved by this court, and when said bond is given and approved all proceedings under the said judgment and sentence appealed from by this writ of error shall be stayed until the termination of the said writ of [346] error by the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and in the meantime the said defendant shall be entitled to his discharge from imprisonment.

Dated this 31st day of May, 1915.

CHARLES E. BUNNELL,

Judge.

Entered in Court Journal No. 13, page 185.

[Indorsed]: Filed May 31, 1915. [347]

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[Caption and Title.]

**Undertaking on Appeal.**

A judgment having been given on the 18th day of May, 1915, whereby the defendant herein, M. F.



Hall, was adjudged and found guilty of the crime of assault upon the person of one Selma Lappi, and was by the Honorable Charles E. Bunnell, Judge of the above-entitled court, sentenced and condemned to imprisonment in the Federal jail in Fairbanks, Alaska for a period of six months and to pay a fine in the sum of Five Hundred Dollars (\$500) and in default of payment of said fine, that he be imprisoned in said jail at the rate of one day for every Two Dollars of said fine, and he having appealed from said judgment and been duly admitted to bail in the sum of Fifteen Hundred Dollars.

NOW, THEREFORE, we, H. L. Hedger, dentist, and W. F. Whitely, broker, residents of the town of Fairbanks, Alaska, hereby undertake that the above-named defendant, M. F. Hall, shall in all respects abide and perform the orders and judgments of the Appellate Court upon the appeal and shall and will abide and perform the judgment appealed from, if sustained on appeal, and shall and will pay all costs of said appeal, if same be adjudged against him or if he fail to do so in any particular, that we will pay to the United States the sum of Fifteen Hundred Dollars.

WITNESS our hands and seals this 31st day of May, 1915.

M. F. HALL.

H. L. HEDGER.

W. F. WHITELEY. [348]

United States of America,  
Territory of Alaska,—ss.

H. L. Hedger and W. F. Whitely, being first duly sworn upon oath says, each for himself, that he is one of the sureties named in and who subscribed the within undertaking; that he is a resident of the Territory of Alaska; that he is not an attorney or counselor at law, marshal, clerk of any court or other officer of any court; that he is worth the sum of fifteen hundred dollars in property exempt from execution and over and above all his just debts and liabilities.

H. L. HEDGER.

W. F. WHITELY.

Taken by and acknowledged and subscribed and sworn to before me this 31st day of May, 1915.

[Seal]

CHARLES E. BUNNELL,

Judge of the District Court for the Territory of  
Alaska, Fourth Division.

Approved this 31st day of May, 1915.

CHARLES E. BUNNELL,

District Judge.

[Indorsed]: Filed May 31, 1915. [349]

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[Caption and Title.]

General March, 1915, Term. Monday, May 31, 1915.

Seventy-eighth Court Day.

**Order Approving Bond.**

Now on this day, came on for hearing the matter of the qualification of the sureties on the bond of

defendant herein, who appeared in person, and by his attorney, Leroy Tozier, the plaintiff being represented by R. F. Roth, United States Attorney; the bondsman thereon, to wit: Dr. H. L. Hedger and W. F. Whitely, were each duly sworn and examined as to the qualification as such sureties, whereupon the Court approved the bond of said defendant.

CHARLES E. BUNNELL,

District Judge.

Entered in Court Journal No. 13, page 185. [350]

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**[Writ of Error (Copy).]**

[Caption and Title.]

The President of the United States: to the Honorable, the Judge of the District Court for the Territory of Alaska, Fourth Judicial Division, Greeting:

Because in the records and proceedings, as also in the rendition of the sentence and judgment of a plea which is in said District Court before you, between the United States of America, plaintiff, and M. F. Hall, defendant and plaintiff in error, as by his complaint appears.

We, being willing that said error, if any have been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given that then, under your seal distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Judicial Circuit to-



gether with this writ so that you have the same at the city of San Francisco, in the State of California, on the 30th day of June, 1915, in the said Circuit Court of Appeals to be then and there heard, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done thereof to correct that error, what of right and according to law and custom of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 31st day of May, 1915.

Clerk of the District Court for the Territory of Alaska, Fourth Judicial Division.

Allowed:

CHARLES E. BUNNELL,  
District Judge.  
J. E. CLARK,

[Indorsed]: Filed May 31, 1915. [352]

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**[Citation (Copy).]**

[Caption and Title (Stricken).]

To, R. F. ROTH, United States District Attorney,  
District Court Territory of Alaska, Fourth  
Judicial Division, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED on behalf of the plaintiff in error, M. F. Hall, to be and appear at a term of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, to be holden in the City of San Francisco, in the State of California, on the 30th day of June, 1915,

pursuant to a writ of error filed in the clerk's office of the District Court for the Territory of Alaska, Fourth Judicial Division, wherein M. F. Hall is plaintiff in error and the United States of America is defendant in error, to show cause, if any there be, why the sentence and judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the plaintiff in error in that behalf.

Dated and done in open court this 31st day of May, 1915.

CHARLES E. BUNNELL,

Judge of the District Court for Alaska, Fourth Division.

Service admitted this 31st day of May, 1915.

R. F. ROTH,

United States District Attorney, Territory of Alaska, Fourth Judicial Division.

[Indorsed]: Filed May 31, 1915. [353]

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[Caption and Title.]

**Order Extending Time to [November 15, 1915, to]  
File Transcript [Copy].**

WHEREAS on the 31st day of May, 1915, upon application of said plaintiff in error the Court made an order extending the time within the transcript in this case should be filed in the said United States Circuit Court, at San Francisco, such extension being based upon the delays and uncertainties of the transmission of mail matter between Fairbanks, Alaska, and San Francisco, California; and,

WHEREAS, it appears that the said order has never been formally entered upon the records by the trial Court at Fairbanks, Alaska,

NOW, THEREFORE, IT IS ORDERED that the clerk of this court do now enter upon his records the order made on the said 31st day of May, 1915, in the following language, to wit:

“IT IS ORDERED that the return day on the writ of error allowed in this case on the 31st day of May, 1915, returnable on the 30th day of June, 1915, be enlarged to the 15th day of November, 1915.”

Dated, Fairbanks, Alaska, this 30th day of September, 1915.

CHARLES E. BUNNELL,  
District Judge.

Service admitted this 30th day of September, 1915.

R. F. ROTH,  
United States District Attorney.

[Indorsed]: Filed September 30, 1915. [354]

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[Caption and Title.]

**[Certificate of Clerk U. S. District Court to  
Transcript of Record.]**

United States of America,  
Territory of Alaska,  
Fourth Division,—ss.

I, J. E. Clark, Clerk of the United States District Court, Territory of Alaska, Fourth Division, do hereby certify that the foregoing, consisting of three hundred and fifty-six pages, numbered from 1 to 356,



inclusive, constitutes a full, true and correct transcript of the record on writ of error in cause No. 689—Criminal, entitled, United States of America, Plaintiff, vs. M. F. Hall, Defendant, wherein M. F. Hall is plaintiff in error, and the United States of America is defendant in error, and was made pursuant to and in accordance with the *praecipe* of the plaintiff in error filed in this action and made a part of this transcript, and by virtue of the citation issued in said cause and is the return thereof in accordance therewith.

And I do further certify that the index thereof, consisting of pages i to iv, is a correct index of said transcript on appeal; also that the costs of preparing said transcript and this certificate, amounting to One Hundred and Sixty-three Dollars (\$163), has been paid to me by counsel for plaintiff in error in said action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court this 15th day of October, 1915.

[Seal]

J. E. CLARK,

Clerk of the District Court, Territory of Alaska,  
Fourth Division. [356]

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[Endorsed]: No. 2678. United States Circuit Court of Appeals for the Ninth Circuit, M. F. Hall, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Alaska, Fourth Division.

Filed November 8, 1915.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

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**[Writ of Error (Original).]**

[Caption and Title (Stricken).]

[Endorsed]: Filed in the District Court, Territory of Alaska, Fourth Division, May 31, 1915. J. E. Clark, Clerk. By —————, Deputy.

The President of the United States, to the Honorable, the Judge of the District Court for the Territory of Alaska, Fourth Judicial Division,  
**GREETING:**

Because in the records and proceedings, as also in the rendition of the sentence and judgment of a plea which is in said District Court before you, between the United States of America, plaintiff, and M. F. Hall, defendant and plaintiff in error, as by his complaint appears.

We, being willing that said error, if any have been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given that then, under your seal distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Judicial Circuit together

with this writ so that you have the same at the city of San Francisco, in the state of California, on the 30th day of June, 1915, in the said Circuit Court of Appeals to be then and there heard, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done thereof to correct that error, what of right and according to law and custom of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 31st day of May, 1915.

J. E. CLARK,

Clerk of the District Court for the Territory of  
Alaska, Fourth Judicial Division.

Allowed:

CHARLES E. BUNNELL,

District Judge.

[Endorsed]: No. 2678. United States Circuit Court of Appeals for the Ninth Circuit. M. F. Hall, Plaintiff in Error, vs. The United States of America, Defendant in Error. Writ of Error. Filed Nov. 8, 1915. F. D. Monekton, Clerk.



**[Citation (Original).]**

**[Caption and Title (Stricken).]**

[Endorsed]: Filed in the District Court, Territory of Alaska, Fourth Division. J. E. Clark, Clerk. By —————, Deputy.

To R. F. ROTH, United States District Attorney,  
District Court Territory of Alaska, Fourth  
Judicial Division, Greeting:

YOU ARE HEREBY CITED AND ADMONISHED on behalf of the plaintiff in error, M. F. Hall, to be and appear at a term of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, to be holden in the city of San Francisco, in the State of California, on the 30th day of June, 1915, pursuant to a writ of error filed in the clerk's office of the District Court for the Territory of Alaska, Fourth Judicial Division, wherein M. F. Hall is plaintiff in error and the United States of America is defendant in error, to show cause, if any there be, why the sentence and judgment in said Writ of Error mentioned should not be corrected and speedy justice should not be done to the plaintiff in error in that behalf.

Dated and done in open court this 31st day of May, 1915.

CHARLES E. BUNNELL,  
Judge of the District Court for Alaska, Fourth Division.

Service admitted this 31st day of May, 1915,

R. F. ROTH,  
United States District Attorney, Territory of  
Alaska, Fourth Judicial Division.

[Indorsed]: No. 2678. United States Circuit Court of Appeals for the Ninth Circuit. M. F. Hall, Plaintiff in Error, vs. The United States of America, Defendant in Error. Citation on Writ of Error. Filed Nov. 8, 1915. F. D. Monckton, Clerk.

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[Caption and Title.]

**Order Extending Time to [November 15, 1915, to]  
File Transcript.**

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Sep. 30, 1915. J. E. Clark, Clerk. Sidney Stewart, Deputy.

WHEREAS, on the 31st day of May, 1915, upon application of said plaintiff in error the Court made an order extending the time within which the transcript in this case should be filed in the said United States Circuit Court, at San Francisco, such extension being based upon the delays and uncertainties of the transmission of mail matter between Fairbanks, Alaska, and San Francisco, California; and,

WHEREAS, it appears that the said order has never been formally entered upon the records by the trial court at Fairbanks, Alaska,

NOW, THEREFORE, IT IS ORDERED that the clerk of this court do now enter upon his records the order made on the said 31st day of May, 1915, in the following language, to wit:

“IT IS ORDERED that the return day on the Writ of Error allowed in this case on the 31st day of May, 1915, returnable on the 30th day of June, 1915, be enlarged to the 15th day of November, 1915.”

Dated, Fairbanks, Alaska, this 30th day of September, 1915.

CHARLES E. BUNNELL,  
District Judge.

Service admitted this 30th day of September, 1915.

R. F. ROTH,  
United States District Attorney.

Entered in Court Journal No. 13, page 265.

[Endorsed]: No. 2678. United States Circuit Court of Appeals for the Ninth Circuit. M. F. Hall, Plaintiff in Error, vs. The United States of America, Defendant in Error. Order Under Rule 16 Enlarging Time to Nov. 15, 1915, to File Record Thereof and to Docket Case. Filed Nov. 8, 1915. F. D. Monckton, Clerk.

---

[Caption and Title.]

**Stipulation as to Printing Record [Original].**

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Oct. 6, 1915. J. E. Clark, Clerk. Sidney Stewart, Deputy.

It is stipulated between the attorneys for the parties respectively, that in printing the record in this case for use in the said court, all captions should be omitted after the title of the cause has been once printed, and the words "Caption and Title" and the name of the paper or document should be substituted therefor; also, that after printing the indorsements and file-marks on the indictment, bill of exceptions, record in the Appellate Court, the in-



dorsements other than file-marks on all other papers should be omitted, and the word "Indorsements" printed in lieu thereof.

All other parts of the record should be printed.

Dated October 6, 1915.

LEROY TOZIER,

Attorney for Plaintiff in Error.

R. F. ROTH,

United States District Attorney for Defendant in Error.

[Endorsed]: No. 2678. United States Circuit Court of Appeals for the Ninth Circuit. M. F. Hall, Plaintiff in Error, vs. The United States of America, Defendant in Error. Stipulation as to Printing Record. Filed Nov. 8, 1915. F. D. Monckton, Clerk.

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

M. F. HALL,

*Plaintiff in Error,*

VS.

UNITED STATES OF AMERICA,

*Defendant in Error.*

## OPENING BRIEF OF PLAINTIFF IN ERROR

T. C. WEST,

LEROY TOZIER,

*Attorneys for Plaintiff in Error.*

WEST, RAFAEL & CURLEY,

*Of Counsel.*

**Filed**

JUN 2 - 1916

Filed this.....day of June, 1916 **F. D. Monckton**

**Clerk**

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.





No. 2678

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

M. F. HALL,

*Plaintiff in Error,*

VS.

UNITED STATES OF AMERICA,

*Defendant in Error.*

## OPENING BRIEF OF PLAINTIFF IN ERROR

### Statement of Case

This is a writ of error to the United States District Court for the Territory of Alaska, Fourth Division, sued out by the defendant, M. F. Hall, to reverse a conviction against him given by a jury in the above division.

The defendant was indicted by the Grand Jury of the crime of assault, as follows:

That the said M. F. Hall, on the 24th day of September, A. D. 1914, at the town of Fairbanks, in the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, and within the jurisdiction of this Court, not being armed with a dangerous weapon, did then and there unlawfully assault one, Selma Lappi, by then and there unfastening some of the underclothing of the said Selma Lappi and then and there placing his hand upon the private parts of the body of the said Selma Lappi, the said Selma Lappi being then and there a female child of the age of nine years and he, the said M. F. Hall, being then and there a male person over the age of twenty-one years, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

The defendant is a man of over fifty years of age, and is a physician and surgeon practicing his profession at the town of Fairbanks, Territory of Alaska.

The plaintiff in error will rely upon the following Amended Assignment of Errors.

### **Amended Assignment of Errors on Writ of Error**

The defendant below and plaintiff in error, in this action, in connection with his petition for a writ of error, makes the following assignment of errors which he avers occurred upon trial of the action, to-wit:

## I.

The Court erred in admitting the evidence of the witness, Charlotte Geis, who testified that she visited the offices of the defendant about thirty-four months before the offense alleged in the indictment herein and that defendant committed then and there an assault upon her person in the same way and manner as that alleged in the indictment herein to have been committed upon the person of Selma Lappi, the complaining witness therein, by taking the said Charlotte Geis upon his lap and placing his hand upon her sexual organs, and in particular that part of the evidence of the said Charlotte Geis, as follows:

Q. How did you happen to go to Dr. Hall's office that time, Charlotte?

A. I went—(cries)—I went with my brother when he had a cut.

Q. Where was your brother cut, Charlotte?

A. (No answer, witness crying.)

MR. STEVENS: The defendant objects to the question and the testimony of this witness; first, for the reason that the witness has not shown herself to be competent to appreciate the obligation of an oath; second, that the testimony is immaterial, irrelevant, incompetent and impertinent for any purpose, as it does not appear that Selma Lappi was present at the time or any other person except



Dr. Hall and the brother Charles; the time is not definitely fixed, and there can be no object in the testimony to be conceived by the defendant at this time, excepting an attempt on the part of the prosecution to prejudice the minds of the jury by offering some testimony that is wholly improper. I can only anticipate the object at this time. Certainly the question he asks, whether preliminary or not, is subject to the objection that I have just made.

(The objection was overruled by the Court, and the defendant reserves an exception, which exception is allowed.)

MR. ROTH: Q. What was the matter with Charlie at that time?

A. He had a cut in the forehead.

Q. Did you leave Dr. Hall's office when Charles left? A. No.

Q. How did you come to not leave?

MR. STEVENS: We object for the reason made to the question last objected to, and for the further reason that no testimony of the nature sought to be given by this witness is competent, for the reason that any conduct, whether proper conduct or improper conduct, upon the part of Dr. Hall towards this child, is wholly inadmissible under the laws, being a different person from that alleged in the

indictment; for the further reason that the testimony is too remote, and there has been no showing upon the part of the Government that it is connected directly or indirectly with the offense charges in the indictment.

THE COURT: What is the purpose of the testimony, Mr. Roth?

MR. ROTH: The purpose of the testimony (interrupted).

MR. MARQUAM: We object unless it appears to the Court that it is clearly admissible, we object to counsel stating the purpose of it in the presence of the jury, for the damage is done if counsel makes the statement.

THE COURT: Objection overruled. (Defendant saves an exception, which exception is allowed.)

MR. ROTH: Q. How did you come not to leave Dr. Hall's office when Charles left?

A. I was sitting in his lap, in Dr. Hall's lap (interrupted).

MR. STEVENS: We desire to be understood that our same objections go to all this testimony.

THE COURT: For the reasons heretofore assigned?

MR. STEVENS: Yes. And we desire an exception to the ruling of the Court allowing it to go on.

MR. ROTH: For the purpose of obviating the necessity of interrupting the witness, the prosecution is willing to stipulate that the objection heretofore made to the questions is made to all of the testimony to be given by this witness, and that an exception is taken and an exception allowed.

THE COURT: Very well.

MR. ROTH: Q. You just stated that you were sitting in Dr. Hall's lap. What did Dr. Hall say?

A. When my brother went, he said, "Sister, are you coming?"

Q. Yes, all right.

A. And the doctor said, "No, she is going to stay here a little while."

Q. All right, then, did your brother go away?

A. Yes.

Q. Was the office door open or was it shut, after your—

A. I think it was shut.

Q. What kind of underclothes did you have on?

A. I didn't have any on.

Q. What kind of clothes were you wearing at that time?

A. Bloomers.

Q. How were the bloomers fastened around the legs here (indicating). A. With elastic.



Q. What did Dr. Hall do after your brother left?

A. Put his hand up under my bloomers.

Q. Where did he put his hand, Charlotte? Did he put it up here (indicating)? A. Yes.

MR. MARQUAM: We object to that and wish the record that at the time counsel is asking the question he is going through motions with his hands and indicating (interrupted).

THE COURT: Objection sustained.

MR. MARQUAM: We ask that counsel be warned not to repeat a performance of that kind.

THE COURT: Of course, Mr. Roth, you will not illustrate what the child may testify to. You should be governed entirely by what the answer of the child is.

MR. ROTH: It is extremely difficult to require a child to mention names. That was why I put the question the way I did.

MR. STEVENS: And that was wholly improper.

MR. ROTH: Q. Where did Dr. Hall put his hand when he put it up under your bloomers?

A. He put it on—

Q. Tell us where he put his hand.

A. Put it right down here (indicating).

Q. Did he do anything with his finger?

A. Yes. (Cries.)

Q. Where did he put his finger?

A. Right here (indicating). (Cries.)

Q. Did he put it inside? A. Yes.

Q. Charlotte, let me ask you this question. What did he do with his finger after he put it inside?

A. Around like this (showing).

Q. Did he say anything to you? A. No.

Q. After that what did he do, Charlotte?

A. Nothing.

Q. How long did you stay there?

A. Not very long.

Q. Did Dr. Hall say anything to you at all?

A. I don't remember of him ever saying a thing.

Q. Was Dr. Hall treating you at that time for anything?

A. Yes, I had—no.

Q. Had he treated you before?

A. Not for any other thing, but one time I had a sty on my eye and he fixed that.

Q. How long before?

A. I don't remember.

Q. But at this time that you went there with Charles, was Dr. Hall treating you at that time?

A. No.

MR. ROTH: You may cross-examine.

## CROSS-EXAMINATION.

By MR. MARQUAM: At this time we move that all the testimony of the witness, Charlotte Geis, be stricken for the reason that the same is irrelevant, incompetent and immaterial, and neither tending to prove or disprove any element of the offense charged, and is not shown to have happened within such time as could throw any light upon any element of the offense charged, and is in no way connected with this case.

(The motion is denied. Defendant saves an exception, which exception is allowed.)

## II.

The Court erred in denying the motion of defendant made at the close of the testimony of said Charlotte Geis, to strike out all the testimony of the said witness relating to a prior and independent alleged offense committed upon the said Charlotte Geis, similar to the offense alleged in the indictment herein, which motion being by the Court denied was duly excepted to as to said denial, by the defendant and exception allowed by the Court.

## III.

That the Court erred in giving and reading to the jury instruction numbered fourteen, as follows:

## 14.

You are instructed that, as a matter of law, when the defendant testified as a witness in this case, he became as any other witness, and his credi-



bility is to be tested and subjected to the same tests as are applied to any other witness. And, in determining the degree of credibility that shall be accorded to his testimony, you have a right to take into consideration the fact that he is interested in the result of the prosecution, as well as his demeanor and conduct upon the witness stand during the trial, and you may also take into consideration the fact—if such be the fact—that he has been contradicted by other witnesses. And you are further instructed that if, after considering all the evidence in the case, you find that the defendant has willingly and wrongfully testified falsely to any fact material to the issue in the case, you have the right to entirely disregard his testimony, except so far as his testimony is corroborated by other creditable testimony.

#### IV.

The Court erred in denying the motion of defendant in arrest of judgment, to which defendant duly excepted and exception allowed by the Court.

#### V.

The Court erred in denying the motion for a new trial duly made by the defendant, to which denial the defendant duly excepted and exception allowed by the Court.

#### VI.

The Court erred in pronouncing sentence and rendering judgment against the defendant.

## Argument

The first assignment of error is taken upon the ground that the Court erred in admitting the evidence of the child Charlotte Geis, upon two grounds. First, it was not shown that the child appreciated the obligations of an oath, and second, that the evidence was altogether inadmissible under any circumstances of the case, and was too remote.

This little girl was only nine years of age (Transcript of Record pp. 150-151). It is quite evident that she did not understand the consequences that might follow if she swore falsely, because when asked the following question: "Q. Do you know in what way you might be punished?", she nodded her head in the negative (Transcript p. 151), and it was not until the learned District Attorney put the following leading question that she finally stated that she did know the consequences that would follow in case she testified falsely:

Q. Do you understand that a person that would tell an untruth after he takes an oath to tell the truth might go to jail?

A. Yes.

Q. Do you realize that a person might go to jail if he swore falsely?

THE COURT to Witness: Instead of shaking your head, say yes or no.

A. Yes.

It is submitted that it was not shown that this child realized to a sufficient degree the sancity of an

oath that would warrant her testimony being admitted in a criminal case, and especially one so serious in its consequences as the case at bar.

The second objection raised to the testimony of this child seems so clear that it scarcely needs argument; namely, that the testimony was inadmissible, and too remote.

Of course, the writer is mindful of the fact of the rule of law that permits evidence of similar offenses committed about the same time being admitted against a defendant in a criminal case, but those cases are generally cases showing some method under which an accused has been accustomed to act in furtherance of a general plan to commit crime, such as the use of the mails for purposes of defrauding; the making or having in possession counterfeiting tools, and cases of like nature, but the law is quite clear that unless the evidence tends to show the commission of a similar offense, showing the method of the accused, it ought not to be admitted. For instance, if a person were accused of murder it would not be contended for a moment that evidence of another murder committed at a previous time by the accused would be admissible under any theory of a murder trial, and again, in case of a man being charged with assault evidence would not be admissible that on a previous occasion he had assaulted someone else. And the evidence given by this little girl, if it was evidence at all, was evidence of another assault, but beyond and above this objection, the evidence was clearly in-



admissible on the ground that it was too remote. The trial of this cause took place in the middle of April, 1915, and the assault that Charlotte Geis testifies to was committed thirty-two months before, or in August, 1912. Surely evidence of a somewhat similar offense committed thirty-two months before the offense charged in the indictment could not under any stretch of the rule under discussion be admitted. For authorities on this point counsel for the plaintiff in error refers the Court to the following:

*People vs. Molineux*, 62 L. R. A. 193 and notes thereunder. It would seem in reading the notes in this case that in any case in which evidence of a similar offense is admitted it must be not only *about the time of the crime charged*, but also must in some way tend either to prove the crime charged or show or tend to prove guilty knowledge. Under an indictment charging the defendant with assault to commit rape, evidence that he on previous occasions had assaulted the prosecutrix was held to be admissible, but evidence that he had assaulted another female with the same intent was held to be incompetent. See notes to above case at page 299. It must be remembered that the evidence given by Charlotte Geis was evidence of a crime committed thirty-two months before.

See also

12 Cyc., pp. 405 and 411.

The second assignment of error is predicated upon the refusal of the Court to grant the de-

fendant's motion to strike out the evidence of the witness Charlotte Geis and needs no further argument, because if the evidence was inadmissible, as contended herein, the motion to strike it out should of course have been granted.

In the third assignment of error, the defendant complains of the instruction given by the trial judge with relation to this testimony inasmuch as it seems to particularly point out the defendant's testimony and distinguish it from that of the other witnesses in the case, especially the latter part of the instruction, as follows:

“You are further instructed that if after considering all the evidence of the case you will find that the defendant has willfully and wrongfully falsely to any fact material to the issue in the case, you have the right to entirely disregard his testimony except so far as his testimony is corroborated by other and creditable testimony.”

It is respectfully submitted that the verdict of guilty be set aside and the defendant granted a new trial.

Respectfully submitted,

T. C. WEST,  
 LEROY TOZIER,  
*Attorneys for Plaintiff  
 in Error.*

WEST, RAFAEL & CURLEY,  
*Of Counsel.*

IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

M. F. HALL,

*Plaintiff in Error,*

VS.

UNITED STATES OF AMERICA,

*Defendant in Error.*

**BRIEF OF DEFENDANT IN ERROR**

JOHN W. PRESTON,  
United States Attorney,

M. A. THOMAS,  
Asst. United States Attorney,  
*Attorneys for Defendant in Error.*

**Filed**

JUN 15 1916

Filed this.....day of June, 1916.

FRANK D. MONCKTON, Clerk.

**F. D. Monckton,**  
Clerk.

By....., Deputy Clerk.





No. 2678

IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

M. F. HALL,

*Plaintiff in Error,*

VS.

UNITED STATES OF AMERICA,

*Defendant in Error.*

**BRIEF OF DEFENDANT IN ERROR**

The plaintiff in error relies on two points for a reversal of the case. They are:

*First:* That the trial court erred in admitting certain testimony of Charlotte Geis, because

(a) It was not shown that she understood the nature of an oath; and

(b) Her testimony was not admissible as it related to transactions too remote.

*Second:* That the trial court erred in giving instruction number 14, which appears at pages 313-314 of the transcript.

## ARGUMENT.

An examination of the transcript shows that the Assignment of Errors on Writ of Error, at pages 326-328 inclusive, does not "quote the full substance of the evidence admitted," as required by Rule 11 of this Court.

Counsel has attempted to cure this defect by securing an order granting permission to file an Amended Assignment of Errors, which appears at pages 328 and 329 of the transcript just following the order referred to.

This can be of no avail and would not be considered by this Court on account of the provisions of Rule 11, which provides that

"The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed."

If the plaintiff stands on his Assignment of Errors he has not complied with the Rule in that he did not quote the evidence admitted and objected to, and if he stands on the Amended Assignment of Errors he has not complied with the Rule in that he did not file it with his petition for the writ of error nor until after the writ of error had been allowed.



The Circuit Court of Appeals, Fourth Circuit, has held that an Assignment of Errors not filed at the time the plaintiff in error files his petition for a writ of error will not be considered by the Appellate Court, even though the trial court at the time the petition is filed grants additional time for filing an Assignment of Errors and it is actually filed within the time granted.

*Mutual Life Insurance Company of New York vs. Conoley*, 63 Fed. Rep., p. 180.

*On the merits the record shows that the witness Charlotte Geis qualified and that her testimony was competent.*

Charlotte Geis was nine years old, lacking but two months of being ten, when she testified (Tr. p. 150) and the record shows that she answered all questions asked in an intelligent manner and understood the nature of the inquiry (Tr. pp. 150 and following).

The record also shows that she was asked a great number of preliminary questions to enable the Court to determine whether or not she was of ordinary intelligence and understood the nature of an oath. The trial judge considered her a competent witness, and unless the record discloses plain error in that regard, his ruling should not be disturbed.

*Wheeler vs. United States*, 159 U. S. 523;  
40 L. Ed. 244.

In the case last cited a boy nearly five and a half years of age testified as to a homicide committed when he was almost five, and was held to have been competent.

The witness Charlotte Geis testified as to acts committed by the defendant on her person about two years and seven months prior to the date of her testimony and about two years before the date of the acts of defendant, set up in the indictment here. Such testimony is admissible to show intent.

12 Cyc. 408;

*Wolfsohn vs. United States*, 101 Fed. 430;  
102 Fed. 134;

*United States vs. Kenny*, 90 Fed. 257.

The period of time within which the matter offered to establish the guilty purpose must have occurred to permit of their admission is largely discretionary with the trial court and the objection that it is too remote goes only to its weight.

*Spurr vs. United States*, 87 Fed. 701, at page 711;

*Moore vs. United States*, 150 U. S. 60.

The testimony of Charlotte Geis is competent to show a depraved and lascivious mind on the part of this middle-aged man, and a tendency to commit the crime charged. Instructions 16 and 17, at pages 315, 316 and 317 of the transcript were carefully

drawn and given to guide the jury as to the purpose of her testimony and with the instructions given there is no error in its admission.

*Instruction 14 was proper and no error was committed by the trial judge in giving this instruction.*

The appellant assigns as error the giving of instruction 14 because "it seems to particularly point out the defendant's testimony and distinguish it from that of the other witnesses in the case . . ."

We respectfully contend that this is not error. Instruction 14 was merely a restatement of instruction 11, with proper matter added. While it dealt solely with the defendant, still it was proper for the trial judge to call the jury's attention to the status of a defendant who takes the witness stand on his own behalf, and the instruction here complained of is one that is often given, and has generally met with the approval of reviewing courts everywhere.

"The instruction of the Court in relation to the credibility of the defendant, who offered himself as a witness, was in all respects legal and proper. We do not agree with the learned counsel for the defendant in holding that it is not competent for the Court to single out a particular witness and charge the jury as to his credibility. On the contrary, the less abstract the more useful the charge. Jurors find but little assistance in the charge of a Judge who deals only with the general and abstract propositions which he supposes to be involved in the case, and leaves the jury to apply them



as best they may. The application is sometimes more difficult than the statement of the rule; hence, that is the most useful charge in which the Judge takes up separately the theories, or each reasonable hypothesis, advanced by counsel or suggested by the testimony, and applies to it the law. In this way, what otherwise might be obscure to the jury is made clear and easy of comprehension. It seldom happens that the exigencies of a case bring in question the credibility of all the witnesses, and when they do not there can be no reason why the charge upon that subject should be made so general as to embrace them all. In our judgment, such a course would be likely to cast suspicion where none is due, and thus tend to mislead the jury. Hence, the Judge should confine his charge to those whose credibility has been assailed by counsel or is clouded by the circumstances of the case." *People vs. Cronin*, 34 Cal. 191-204.

In *Hirschman vs. People*, 101 Ill. 568, the trial court gave an instruction which is, word for word, almost identical with the instruction complained of here, and the Supreme Court of Illinois held it to be not erroneous.

In *McCraken vs. People*, 209 Ill. 215; 70 N. E. 749, the Court said:

"The objection to the seventeenth instruction given on behalf of the people is that it specifically points out the accused, and calls attention to their testimony; stating that, if they have wilfully and corruptly testified falsely to any fact material to the issue, the jury had the right to entirely disregard their testimony etc., the contention is that it erroneously calls particular attention to the defendants instead of

relating to witnesses generally. It is substantially in the language of instructions approved in *Hirschman vs. People*, 101 Ill. 568; *Leigh vs. People*, 113 Ill. 572, and *Seibert vs. People*, 143 Ill. 571.

There was no error in giving the instructions."

See also

*Haines vs. Territory*, 3 Wyo. 167, 13 Pac. 8;  
*State vs. Melvern*, 32 Wash. 7, 72 Pac. 489.

In the case of *United States vs. Coqutlam*, the district judge, in his charge to the jury, said in part, speaking with reference to certain testimony given by the masters of the schooners involved:

"I therefore think their evidence should be received with caution, if not wholly rejected where it is contradicted by other evidence, or rendered improbable by surrounding circumstances." 57 Fed. 706-711.

We respectfully submit that there is no error in the record and ask therefore that the judgment be affirmed.

JOHN W. PRESTON,  
United States Attorney,

M. A. THOMAS,  
Asst. United States Attorney,  
*Attorneys for Defendant in Error.*





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

---

MERCHANTS NATIONAL BANK OF SAN  
FRANCISCO, a Corporation,

Petitioner,

vs.

THE CONTINENTAL BUILDING AND LOAN  
ASSOCIATION, a Corporation, et al.,

Respondents.

In the Matter of CONTINENTAL BUILDING AND  
LOAN ASSOCIATION, Bankrupt.

---

**Petition for Revision**

Under Section 24b of the Bankruptcy Act of Congress, Approved  
July 1, 1898, to Revise, in Matter of Law, of a  
Certain Order of the United States District  
Court for the Northern District  
of California, First  
Division.

**Filed**

JAN 13 1916

**F. D. Monckton,**  
**Clerk.**



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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MERCHANTS NATIONAL BANK OF SAN  
FRANCISCO, a Corporation,

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vs.

THE CONTINENTAL BUILDING AND LOAN  
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RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the United States Circuit Court of Appeals, for  
the Ninth Circuit.*

No. 2684.

In the Matter of CONTINENTAL BUILDING  
AND LOAN ASSOCIATION, In Bank-  
ruptcy.

**Petition to Revise in Matter of Law.**

To the Honorable, the Judges of the United States  
Circuit Court of Appeals, for the Ninth Circuit:

The petition of the Merchants National Bank of  
San Francisco, a corporation, respectfully shows:

I.

Said Merchants National Bank of San Francisco  
is a national banking corporation organized and ex-  
isting under and by virtue of the laws of the United  
States of America, and at all times herein mentioned  
was, and now is, engaged in a national banking busi-  
ness within the city and county of San Francisco,  
State of California.

II.

Heretofore, to wit, on the 9th day of August, 1915,  
the Continental Building and Loan Association was  
duly adjudged a bankrupt by an order of the Dis-  
trict Court of the United States, duly given and  
made on that date. On said day, the said Court duly  
gave and made an order referring all further pro-  
ceedings in said matter to the Honorable Armand B.  
Kreft, referee in bankruptcy, within said city and  
county of San Francisco, before whom all further  
proceedings herein have been had.

## III.

Ever since its organization, and at a time when the indebtedness hereinafter mentioned was incurred, the said Continental Building and Loan Association was, ever since has been, and it still is, a building and loan corporation, organized under the laws of part IV, title XVI, chapter — of the Civil Code of the State of California, for the purposes of conducting the business of a building and loan corporation, and ever since its incorporation, it has been conducting such business, and has conducted no other business.

## IV.

All of the persons, firms and corporations, who have filed creditors' claims against said bankrupt, except the petitioner, Merchants National Bank of San Francisco, and Pacific Gas and Electric Company, who filed a claim in the sum of \$2.90, and Grant Company, a corporation, who filed a claim in the sum of \$9,584.80, were, at the time of the creation of the indebtedness mentioned in their claims, ever since have been, and they still are, stockholders and members of said bankrupt corporation, owning and holding respectively shares of its capital stock.

## V.

At and before the filing of said petition in bankruptcy, said Continental Building and Loan Association was justly and truly indebted to your petitioner in the sum of \$2,511.20, for money loaned and advanced by Merchants National Bank of San Francisco to said Continental Building and Loan Association. Said Merchants National Bank of San Francisco has not received, nor has any person by

its order, for its use, had or received any manner of security for said debt whatever. A note has been received for a portion of said debt, to wit, \$2,500.00, but no judgment has been rendered thereon. Your petitioner owns an unsecured claim provable in bankruptcy against said bankrupt, and is a creditor of said bankrupt.

## VI.

On the 30th day of August, 1915, your petitioner filed herein its claim against said bankrupt in the sum of \$2,511.20, and attached thereto was the original note evidencing a portion of said indebtedness, to wit, \$2,500.00. Said claim was presented and filed on said date, and there was filed with said referee on said date, a proof of said claim, in due form, as required by law, duly verified by it, and that no objection or opposition was made to said proof of claim, and said claim was duly allowed and approved by said referee.

## VII.

At the time of filing said claim, your petitioner presented and filed therewith a letter of attorney, in due form, duly authenticated, authorizing and empowering its attorney, R. P. Henshall, to represent it at any and all meetings of creditors, and to vote for it and on its behalf for or against any proposal or resolution that might lawfully be made or passed at such or any meeting, and for the choice of a trustee or trustees of the estate of said bankrupt. No opposition or objection was ever made to said letter of attorney by anyone.



## VIII.

On the 15th day of September, 1915, the first meeting of creditors of said bankrupt was duly held in the office of said referee, in the Postoffice Building, in the city and county of San Francisco, as required by law, and at said time and place, an election of a trustee of the estate of said bankrupt was held. Your petitioner was present on said day, at said time and place, by its attorney and by its said proxy. At said time and place there were further present and represented, claims and claimants against said bankrupt, each and all of whom were, as hereinbefore alleged, stockholders and members of said bankrupt corporation, and not otherwise, and there was not present at said meeting any creditor in person or by proxy, except your petitioner and Pacific Gas and Electric Company and Grant Company, who was not a stockholder or a member of said bankrupt corporation, but said Pacific Gas and Electric Company and said Grant Company did not, on said 15th day of September, 1915, as your petitioner is informed and believes, and therefore alleges the fact to be, vote or attempt to vote on said date, either in person or by proxy.

## IX.

At said time and place, petitioner duly moved said referee for an order that no claimants, and that no person present or by proxy, or by attorney, be allowed to vote for trustee, except your petitioner, Merchants National Bank of San Francisco, and any other person, creditor of said bankrupt, holding a provable claim against said bankrupt, who was not

a member or stockholder of said bankrupt, on the ground then stated, that stockholders and members of said bankrupt who attempted to vote as creditors of said bankrupt, were not creditors having provable claims, within the meaning of the bankrupt act. And your petitioner at said time and place further moved that as there were no creditors of said bankrupt present in person or by proxy, or by attorney, who were not members or stockholders of said bankrupt corporation, other than your petitioner, that your petitioner be alone allowed to vote for the office of said trustee, and that all said other persons be refused and denied the right to vote.

Thereupon said referee denied and overruled the motion of your petitioner, to which said ruling the said petitioner then and there, by its attorney, duly excepted, and now excepts.

X.

Said petitioner further moved, at said time and place, that it be allowed to vote at any and all elections to be held for the office of trustee, and said referee then and there denied your petitioner the right to vote at said or any election, to which said ruling your petitioner herein then excepted, and now excepts.

XI.

Thereupon, and over the objection of your petitioner, the said referee permitted the other persons present, claiming to be creditors of said bankrupt, and who were members and stockholders thereof, and not otherwise, to vote for the election of the office of trustee.



## XII.

Thereafter and on the 29th day of September, 1915, your petitioner filed in said District Court his petition for a review of said order of the referee, which said petition came on for hearing, duly and regularly, before said District Court and was thereafter argued and submitted to said District Court. On the 9th day of November, 1915, the same order of the referee, so made as aforesaid, was by the said District Court affirmed. That accompanying said order was an opinion filed by the Judge of said District Court, giving the reasons for making said order, to which said opinion reference in that behalf is hereby made.

## XIII.

And your petitioner herein alleges that the said referee in making the said order and rulings, as aforesaid, in the said District Court, and the said District Court in affirming the order and decision of said referee in the premises aforesaid, erred in the following particulars as a matter of law, to wit:

1. Said referee and said District Court erred in holding that your petitioner was not the only creditor present who was entitled to vote for the office of trustee.

2. Said referee and said District Court erred in denying the motion of your petitioner that no other persons present, other than your petitioner, be allowed to vote for the office of trustee.

3. Said referee and said District Court erred in allowing persons claiming to be creditors of said bankrupt, who were stockholders and members



thereof, to vote for the office of trustee of said bankrupt corporation.

4. Said referee and said District Court erred in excluding your petitioner herein from its right to vote for the office of said trustee.

5. Said District Court erred in deciding that it was unnecessary to definitely determine at this time whether the shareholders of said Continental Building and Loan Association were creditors.

6. Said District Court erred in holding that the alleged bankrupt could, by naming its shareholders in its petition in voluntary bankruptcy, establish or create their status as creditors of the Association.

Therefore your petitioner contends that the said order of said District Court was erroneous in matter of law.

WHEREFORE, your petitioner, feeling grieved because of such order, asks that the same be revised in matter of law by the Honorable United States Circuit Court of Appeals, as provided in Section 24b of the Bankruptcy Act of the United States, and the rules and practices in such case made and provided.

MERCHANTS NATIONAL BANK OF  
SAN FRANCISCO.

By W. W. JONES,  
Cashier.

R. P. HENSHALL,  
Attorney for Petitioner.

State of California,  
City and County of San Francisco,—ss.

W. W. Jones, being first duly sworn, deposes and says:

That he is an officer, to wit, the cashier of the Merchants National Bank of San Francisco, petitioner in the above-entitled matter, and as such is authorized to make, and does make, this verification on behalf of said petitioner; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters, that he believes it to be true.

W. W. JONES.

Subscribed and sworn to before me this 18th day of November, 1915.

[Seal]

CHARLES R. HOLTON,  
Notary Public, in and for the City and County of  
San Francisco, State of California.

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[Endorsed]: No. 2684. United States Circuit Court of Appeals for the Ninth Circuit. Merchants National Bank of San Francisco, a Corporation, Petitioner, vs. The Continental Building and Loan Association, a Corporation et al., Respondents. In the Matter of Continental Building and Loan Association, Bankrupt. Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, of a Certain Order of the United States District

Court for the Northern District of California, First Division.

Filed November 18, 1915.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals,  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

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*In the United States Circuit Court of Appeals, for  
the Ninth Circuit.*

In the Matter of CONTINENTAL BUILDING  
& LOAN ASSOCIATION,

In Bankruptcy.

**Affidavit of Service [of Notice of Filing of Petition  
to Revise].**

United States of America,  
State of California,  
Northern District of California,—ss.

Lester Alexander, being first duly sworn, deposes  
and says:

That he is over the age of eighteen years, a citizen  
of the United States and not a party to the above-  
entitled action; that on the 20th day of November,  
1915, he personally served the annexed notice of the  
filing of petition to revise in matter of law upon R. G.  
Hunt, attorney at law, whose office is at No. 544 Mar-  
ket Street, in the city and county of San Francisco,  
and who appears as attorney for certain persons  
claiming to be creditors herein, by delivering and  
leaving a true copy of said petition in the said office



of said R. G. Hunt with the clerk in said R. G. Hunt's office, who was then an adult person over the age of eighteen years.

That on the 20th day of November, 1915, he personally served the annexed notice of the filing of petition to revise in matter of law upon J. S. Hutchinson, attorney at law, whose office is Room No. 923, First National Bank Building, in the city and county of San Francisco, and who appears as attorney for certain persons claiming to be creditors herein, by delivering and leaving a true copy of said petition in said office of said J. S. Hutchinson with the clerk in said J. S. Hutchinson's office, who was then an adult person over the age of eighteen years.

LESTER ALEXANDER.

Subscribed and sworn to before me this 3d day of December, 1915.

[Seal] CHARLES R. HOLTON,  
Notary Public in and for the City and County of San  
Francisco, State of California.

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*In the United States Circuit Court of Appeals, for  
the Ninth Circuit.*

No. 2684.

In the Matter of CONTINENTAL BUILDING &  
LOAN ASSOCIATION,  
In Bankruptcy.

**Affidavit of Service [of Notice of Filing of Petition  
to Revise].**

United States of America,  
State of California,  
Northern District of California,—ss.

Lester Alexander, being first duly sworn, deposes and says:

That he is over the age of eighteen years, a citizen of the United States and not a party to the above-entitled action; that on the 20th day of November, 1915, he personally served the annexed notice of the filing of petition to revise in matter of law upon W. C. Cavitt, attorney-at-law, whose office is at Room 422, Rialto Building, in the City and County of San Francisco, and who appears as attorney for certain persons claiming to be creditors herein; that there was no one in the office of said W. C. Cavitt at the time affiant left said copy of said petition and that affiant left the same on a chair in said office in a conspicuous place therein between the hours of ten o'clock A. M. and five o'clock P. M. of said day; that since said day affiant has talked with the said W. C. Cavitt, who has admitted that he has received copy of said petition.

LESTER ALEXANDER.

Subscribed and sworn to before me this 3d day of December, 1915.

[Seal] CHARLES R. HOLTON,  
Notary Public in and for the City and County of San  
Francisco, State of California.

[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Continental Building & Loan Association, in Bankruptcy. Affidavits of Service.

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*In the United States Circuit Court of Appeals, for  
the Ninth Circuit.*

In the Matter of CONTINENTAL BUILDING &  
LOAN ASSOCIATION,

In Bankruptcy.

**Notice of Filing of Petition to Revise in Matter of  
Law.**

To Continental Building & Loan Association, and  
Nat Schmulowitz, Its Attorney:

To George W. Mordecai, in *pro. per.* and Appearing  
for James McCullough;

To R. G. Hunt, Attorney for Certain Persons Claim-  
ing to be Creditors;

To W. C. Cavitt, Attorney for Certain Persons  
Claiming to be Creditors;

To W. D. Mansfield, Attorney for Certain Persons  
Claiming to be Creditors;

To J. S. Hutchinson, Attorney for Certain Persons  
Claiming to be Creditors;

To J. G. de Forest, Attorney for Certain Persons  
Claiming to be Creditors;

To B. M. Aikins, Attorney for Claimants Wilson  
et al.;

To Sidney M. Ehrman, Attorney for Certain Persons  
Claiming to be Creditors; and

To John Yule, Attorney for Certain Persons Claim-  
ing to be Creditors:



YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that a petition to revise in matter of law the order of the Disrtict Court of the United States, for the Northern District of California, First Division, given and made on the 9th day of November, 1915, in and by which order said District Court affirmed an order and ruling of the referee, theretofore made, denying the motion and application of the Merchants' National Bank of San Francisco, a creditor of said bankrupt, for an order that all of the stockholders, claiming to be creditors of said Continental Building and Loan Association, be excluded from the right to vote for the office of trustee herein upon the ground that they were not creditors within the meaning of the bankruptcy act and that said Merchants' National Bank of San Francisco alone be allowed the right to vote for the office of such trustee, was filed and presented in the clerk's office of the United States Circuit Court of Appeals, for the Ninth Circuit, on the 18th day of November, 1915, a copy of which is herewith served upon you, and docketed No. 2684 on the records of said court; that the record in said cause will be prepared and filed in said court, as required by the rules and practice of said court and that the same will thereafter be printed, and a copy furnished you.

Dated this 19th day of November, 1915.

R. P. HENSHALL,  
Attorney for Petitioner, Merchants' National Bank  
of San Francisco.

RECEIVED from R. P. Henshall, attorney for  
Merchants' National Bank of San Francisco, peti-

tioner herein, notice of filing and presentment of petition for revision in matter of law herein, together with copy of said petition, this 20th day of November, 1915.

NAT SCHMULOWITZ,  
Attorney for Continental Building and Loan Association, Bankrupt.

GEORGE W. MORDECAI,  
Attorney in *pro. per.* and Appearing for James McCullough.

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Attorney for Certain Persons Claiming to be Creditors.

SIDNEY M. EHRMAN,  
Attorney for Certain Persons Claiming to be Creditors.

WALTER D. MANSFIELD,  
Attorney for Certain Persons Claiming to be Creditors.

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Attorney for Certain Persons Claiming to be Creditors.

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Attorney for Certain Persons Claiming to be Creditors.

B. M. AIKINS,  
Attorney for Certain Claimants Wilson et al.

J. G. DeFOREST,  
Attorney for Certain Persons Claiming to be Creditors.

JOHN YULE,

Attorney for Certain Persons Claiming to be  
Creditors.

H. D. NEWHOUSE,

Attorney for Certain Persons Claiming to be  
Creditors.

[Endorsed]: No. 2684. United States Circuit  
Court of Appeals for the Ninth Circuit. In the  
Matter of Continental Building and Loan Associa-  
tion, In Bankruptcy. Notice of Filing of Petition to  
Revise in Matter of Law. Original. Filed Dec. 3,  
1915. F. D. Monckton, Clerk.





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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In the Matter of CONTINENTAL BUILDING AND  
LOAN ASSOCIATION, Bankrupt.

MERCHANTS NATIONAL BANK OF SAN  
FRANCISCO, a Corporation,  
Appellant,

vs.

THE CONTINENTAL BUILDING AND LOAN  
ASSOCIATION, a Corporation, et al.,  
Appellees.

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**Transcript of Record.**

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Upon Appeal from the United States District Court for the Northern  
District of California, First Division,

and

In Support of a Petition for Revision Under Section 24b of the  
Bankruptcy Act of Congress, Approved July 1, 1898,  
to Revise, in Matter of Law, an Order of  
Said District Court.

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**[Names and Addresses of Attorneys.]**

*In the District Court of the United States, for the  
Northern District of California, First Division.*

No. 9509.

In the Matter of CONTINENTAL BUILDING AND  
LOAN ASSOCIATION, a Corporation,  
In Bankruptcy,

R. P. HENSHALL, Esq., Attorney for Merchants'  
National Bank, Appellant Herein.

R. G. HUNT, Esq., HUGO D. NEWHOUSE, Esq.,  
et al., Attorneys for Certain Creditors, Appellees  
Herein.

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*In the District Court of the United States, Northern  
District of California, First Division.*

In the Matter of CONTINENTAL BUILDING AND  
LOAN ASSOCIATION,  
In Bankruptcy,

**Appellant's Praecipe [for Transcript of Record].**

To W. B. Maling, Esq., Clerk of Said Court:

Please issue and make up a record in the above-entitled matter, containing the following papers:

1. Petition of Merchants' National Bank of San Francisco to Review Order of Referee;
2. Statement of facts prepared by Referee and transmitted to said District Court on said Petition of said Merchants' National Bank of San Francisco.
3. Order of said District Court affirming Order of Referee.

4. Opinion of District Court given upon such affirmations.
5. Petition for appeal by Merchants' National Bank of San Francisco from said Order and Order allowing appeal.
6. Assignment of Errors.
7. Bond on Appeal.
8. Order extending time to prepare record on Petition for Review and on Appeal to December 1st, 1915.
9. Citation.

The record on the Petition for Review and on the Appeal may be embraced in one transcript and will be so printed in the United States Circuit Court of Appeals.

DATED this 26th day of November, 1915.

R. P. HENSHALL,

Attorney for Merchants' National Bank of San Francisco.

[Endorsed]: Filed Nov. 26, 1915, at 2 o'clock and — Min P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [1\*]

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*In the District Court of the United States, in and for the Northern District of California, First Division.*

No. 9509—IN BANKRUPTCY.

In the Matter of CONTINENTAL BUILDING & LOAN ASSOCIATION, a Corporation,  
Bankrupt.

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\*Page-number appearing at foot of page of original certified Record.

**Appellees' Praecipe [to Include Additional Portions  
of Record in Transcript].**

To the Clerk of the Above-entitled Court:

You are hereby requested, in accordance with Rule No. 75a of the Rules of Practice for the Courts of Equity of the United States promulgated by the Supreme Court of the United States on November 4, 1912, by the undersigned George P. Dillman, one of the appellees on the appeal and petition to revise heretofore taken by the Merchants' National Bank of San Francisco, a corporation, from the order of the above-entitled court made herein on the 9th day of November, 1915, refusing the said corporation the exclusive right to vote for trustee in bankruptcy, to include the following additional portions of the record in the transcript:

(1) Referee's certificate on petition to review his order made September 15, 1915, denying the Merchants' National Bank of San Francisco, a corporation, the exclusive right to vote for trustee in bankruptcy.

(2) Page 13 commencing with the words "A second Petition to review another order herein," and pages 14 and 15 of [2] the referee's certificate on petition to review his order made on the 15th day of September, 1915, disapproving the election of the Anglo California Trust Company as the trustee of the estate of the bankrupt.

(3) Certified copy of the by-laws of the Continental Building & Loan Association.



Dated December 13th, 1915.

HUGO D. NEWHOUSE,  
Attorney for George P. Dillman, One of the Ap-  
pellees Herein.

Receipt of a copy of the foregoing appellee's  
praecipe is hereby admitted this 13th day of Decem-  
ber, 1915.

R. P. HENSHALL,  
Attorney for Merchants' National Bank of San Fran-  
cisco, a Corporation.

[Endorsed]: Filed Dec. 14, 1915, at 2 o'clock P. M.  
W. B. Maling, Clerk. By C. W. Calbreath, Deputy  
Clerk. [3]

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*In the District Court of the United States, in and for  
the Northern District of California, First Di-  
vision.*

No. 9509.

In the Matter of CONTINENTAL BUILDING  
AND LOAN ASSOCIATION, in Bank-  
ruptcy.

**Petition of Merchants National Bank of San  
Francisco.**

To the Honorable M. T. DOOLING, Judge of the  
District Court of the United States, Northern  
District of California, First, Division, and to the  
Honorable ARMAND B. KREFT, Referee:

The petition of Merchants National Bank of San  
Francisco, a creditor of the above-named bankrupt,  
of the city and county of San Francisco, State of  
California, respectfully shows:

I.

Said Merchants National Bank of San Francisco is a national banking corporation organized and existing under and by virtue of the laws of the United States of America, and at all times herein mentioned was, and now is, engaged in a national banking business within the city and county of San Francisco, State of California.

II.

Heretofore, to wit, on the 9th day of August, 1915, the Continental Building and Loan Association was duly adjudged a bankrupt by an order of the above-entitled court, duly given and made on that date. On said day, the said Court duly gave and made an order referring all further proceedings in said matter to the Honorable Armand B. Kreft, referee in bankruptcy, within said city and county of San Francisco, before whom all further proceedings herein have been had. [4]

III.

Ever since its organization, and at a time when the indebtedness hereinafter mentioned was incurred, the said Continental Building and Loan Association was, ever since has been, and it still is, a building and loan corporation, organized under the laws of part —, title —, chapter —, of the Civil Code of the State of California, for the purposes of conducting the business of a building and loan corporation, and ever since its incorporation, it has been conducting such business, and has conducted no other business.

IV.

All of the persons, firms and corporations who

have filed creditors' claims against said bankrupt, except the petitioner Merchants National Bank of San Francisco, and Pacific Gas and Electric Company, who filed a claim in the sum of \$2.90, and Grant Company, a corporation, who filed a claim in the sum of \$9,584.80, were, at the time of the creation of the indebtedness mentioned in their claims, ever since have been, and they still are, stockholders and members of said bankrupt corporation, owning and holding respectively shares of its capital stock.

#### V.

At and before the filing of said petition in bankruptcy, said Continental Building and Loan Association was justly and truly indebted to your petitioner in the sum of \$2,511.20, for money loaned and advanced by Merchants National Bank of San Francisco to said Continental Building and Loan Association. Said Merchants National Bank of San Francisco has not received, nor has any person by its order, for its use, had or received any manner of security for said debt whatever. A note has been received for a portion of said debt, to wit, \$2,500, but no judgment has been rendered thereon. Your petitioner owns an unsecured claim provable in bankruptcy against said bankrupt, and is a creditor of said bankrupt. [5]

#### VI.

On the 30th day of August, 1915, your petitioner filed herein its claim against said bankrupt in the sum of \$2,511.20, and attached thereto was the original note evidencing a portion of said indebtedness, to wit, \$2,500. Said claim was presented and filed



on said date, and there was filed with said referee on said date, a proof of said claim, in due form, as required by law, duly verified by it, and that no objection or opposition was made to said proof of claim, and said claim was duly allowed and approved by said referee.

## VII.

At the time of filing said claim, your petitioner presented and filed therewith a letter of attorney, in due form, duly authenticated, authorizing and empowering its attorney, R. P. Henshall, to represent it at any and all meetings of creditors, and to vote for it and on its behalf for or against any proposal or resolution that might lawfully be made or passed at such or any meeting, and for the choice of a trustee or trustees of the estate of said bankrupt. No opposition or objection was ever made to said letter of attorney by anyone.

## VIII.

On the 15th day of September, 1915, the first meeting of creditors of said bankrupt was duly held in the office of said referee, in the Postoffice Building, in the city and county of San Francisco, as required by law, and at said time and place, an election of a trustee of the estate of said bankrupt was held. Your petitioner was present on said day, at said time and place, by its attorney and by its said proxy. At said time and place there were further present and represented, claims and claimants against said bankrupt, each and all of whom were, as hereinbefore [6] alleged, stockholders and members of said bankrupt corporation, and not otherwise, and there

was not present at said meeting any creditor in person or by proxy, except your petitioner and Pacific Gas and Electric Company and Grant Company, who was not a stockholder or a member of said bankrupt corporation, but said Pacific Gas and Electric Company and said Grant Company did not, on said 15th day of September, 1915, as your petitioner is informed and believes, and therefore alleges the fact to be, vote or attempt to vote on said date, either in person or by proxy.

### IX.

At said time and place, petitioner duly moved said referee for an order that no claimants, and that no person present or by proxy, or by attorney, be allowed to vote for trustee, except your petitioner Merchants National Bank of San Francisco, and any other person, creditor of said bankrupt, holding a provable claim against said bankrupt, who was not a member or stockholder of said bankrupt, on the ground then stated, that stockholders and members of said bankrupt who attempted to vote as creditors of said bankrupt, were not creditors having provable claims, within the meaning of the bankrupt act. And your petitioner at said time and place further moved that as there were no creditors of said bankrupt present in person or by proxy, or by attorney, who were not members or stockholders of said bankrupt corporation, other than your petitioner, that your petitioner be alone allowed to vote for the office of said trustee, and that all said other persons be refused and denied the right to vote.

Thereupon said referee denied and overruled the

motion of your petitioner, to which said ruling the said petitioner then and there, by its attorney, duly excepted, and now excepts. [7]

X.

Said petitioner further moved, at said time and place, that it be allowed to vote at any and all elections to be held for the office of trustee, and said referee then and there denied your petitioner the right to vote at said or any election, to which said ruling your petitioner herein then excepted, and now excepts.

XI.

Thereupon, and over the objection of your petitioner, the said referee permitted the other persons present, claiming to be creditors of said bankrupt, and who were members and stockholders thereof, and not otherwise, to vote for the election of the office of trustee.

XII.

Your petitioner further alleges that said referee in making said order and rulings, erred in the following particulars, to wit:

1. Said referee erred in holding that your petitioner was not the only creditor present who was entitled to vote for the office of trustee.

2. Said referee erred in denying the motion of your petitioner that no other persons present, other than your petitioner, be allowed to vote for the office of trustee.

3. Said referee erred in allowing persons claiming to be creditors of said bankrupt, who were stockholders and members thereof, to vote for the office of



trustee of said bankrupt corporation.

4. Said referee erred in excluding your petitioner herein from its right to vote for the office of said trustee. [8]

Wherefore, your petitioner prays this Honorable Court that it review the said order and rulings of the referee as aforesaid; that said referee certify the said questions to this Court for its decision; that said order denying the motion of said Merchants National Bank of San Francisco be disapproved, and that this Court make an order disallowing the right of any other person, other than your petitioner, to vote for the office of trustee, except any person creditor of said bankrupt, who is not a stockholder or member thereof.

R. P. HENSHALL,  
Attorney for Petitioner.

State of California,

City and County of San Francisco,—ss.

W. W. Jones, being duly sworn, deposes and says: That he is an officer, to wit, the cashier, of Merchants National Bank of San Francisco, petitioner in the above-entitled matter, and as such is authorized to make, and does make, this verification on behalf of said petitioner; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information and *believe*, and as to those matters, that he believes it to be true.

W. W. JONES.

Subscribed and sworn to before me this 27th day of September, 1915.

[Seal]

ELLA L. SMITH,

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires June 28, 1919.

[Endorsed]: Filed Sep. 27, 1915, at 3 o'clock and 20 minutes P. M. A. B. Kreft, Referee in Bankruptcy. [9]

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**[Stipulation to Substitute Copy of Referee's Certificate in Record in Place of Original.]**

*In the District Court of the United States, in and for the Northern District of California, First Division.*

No. 9509—IN BANKRUPTCY.

In the Matter of CONTINENTAL BUILDING & LOAN ASSOCIATION, a Corporation,  
Bankrupt.

It is hereby stipulated and agreed by and between Merchants National Bank of San Francisco, a corporation, the appellant herein, and George P. Dillman, an appellee herein, that in making up the record on appeal and petition to revise herein by the said Merchants National Bank of San Francisco from the order of the above-entitled court made herein on the 9th day of November, 1915, denying the said Merchants National Bank of San Francisco the exclusive right to vote for trustee in bankruptcy, the clerk of the above-entitled court shall substitute in the place and stead of the original referee's cer-

tificate on petition to review his order made September 15, 1915, denying the said Merchants National Bank of San Francisco the right to vote on the election of trustee, the following copy thereof:

“(Title of Court and Cause.)

**Referee's Certificate on Petition to Review.**

To the Honorable MAURICE T. DOOLING, Judge  
of the District Court of the United States, in  
and for the Northern District of California:

The undersigned referee in *bankrupt*, to whom was referred the above-entitled matter, respectfully certifies and reports:

That on September 15, 1915, an order was made herein denying the Merchants' National Bank of San Francisco the right to vote on the election of trustee herein. On September 27, 1915, within the time extended by the referee, the Merchants National Bank of San Francisco, a creditor herein, feeling aggrieved by said order, filed a petition to review the same.  
[10]

The contention of this claimant respecting the choice of a trustee is partially stated by me at pages 14 and 15 in my certificate of this date on the petition to review, taken by W. L. Wilson and others. Mr. Henshall, representing this creditor, stated that the claim of this creditor was entitled to priority over the claims of the stockholders herein.

Secured creditors or creditors entitled to priority are not entitled to participate in the election of a trustee except on the excess of their claims over the value of their securities or priorities. As this creditor claims priority in full for its claim, it has no



vote on the election of the trustee. (Sec. 57e Bankruptcy Act.)

When Mr. Henshall sought to vote the claim of this creditor for trustee I enquired of him whether this creditor intended to waive its claim of priority which Mr. Henshall had asserted at a previous session. Mr. Henshall replied that he did not intend to waive such claim of priority; whereupon he was denied the right to participate in the election.

The total indebtedness schedules by the bankrupt to stockholders is \$751,434.65. Creditors other than stockholders have been termed "outside creditors." The following mentioned claims have been filed for such creditors: Merchants National Bank of San Francisco, \$2,611.20; Grant Company, for rent of premises occupied by bankrupt, \$9,584.00; Pacific Gas & Electric Company, \$2.90; total, \$12,198.90. These claims are not scheduled by the bankrupt, being, as I am informed, inadvertently omitted. I am also informed that there are no other creditors of this class. The contention of this claimant is that such outside creditors are the only creditors entitled to name a trustee herein.

For reasons stated in my certificate on the review of Wilson et al., pages 14 and 15, I cannot agree with counsel that the stockholders have no standing herein as creditors; that the only persons entitled to name a trustee are so-called outside creditors, and that the members of the association who have paid moneys to the association in the form of dues upon their stock, which in this case comprises substantially all the indebtedness of the bankrupt, cannot be heard in the

matter of selecting a trustee to conduct the liquidation of the concern.

The order reviewed was an oral ruling of the referee, made at the time said claimant sought to vote its claim.

San Francisco, Sept. 30, 1915.

Respectfully submitted,

A. B. KREFT,

Referee in Bankruptcy."

Dated December 20th, 1915.

R. P. HENSHALL,

Attorney for Merchants National Bank of San Francisco.

HUGO D. NEWHOUSE,

Attorney for George P. Dillman.

[Endorsed]: Filed Dec. 21, 1915, at 10 o'clock and 30 min. A. M. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [11]

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[Certificate of Referee on Petition to Review,  
Portion Taken by W. L. Wilson et al.]

PORTION OF REFEREE'S CERTIFICATE ON  
PETITION TO REVIEW, TAKEN BY W. L.  
WILSON et al.

A second petition to review another order herein has been filed by the Merchants National Bank of San Francisco, which is sent up under a separate certificate. The Merchants National Bank is an outside creditor, having a claim for \$2,611.20. It takes the position that as the stockholders are liable for the debts of the corporation, its claim is entitled

to priority, and must be paid in full. Its petition for review is based upon the proposition that the outside creditors alone are entitled to name the trustee; that stockholders of the bankrupt are disqualified. At the meeting of September 15th, counsel for the Merchants National Bank sought to vote this claim and to exclude all stockholders from participating in the election. In my opinion the taking of this petition to review emanates from the office of counsel for the bankrupt. It is represented by an attorney associated with the attorney for the bankrupt. In addition to said Merchants National Bank there are only two creditors who are not stockholders, and their claims amount to \$9,587.70.

Considering that the indebtedness to the stockholders as scheduled amounts to \$751,434.65, and that the assets which are scheduled at \$769,508.13, will, with the exception of the few outside creditors named, be distributed to the stockholders, I can have no patience with a creditor who is claiming the right to be paid in full and who attempts to take the administration of this estate upon a claim of \$2,611.20 out of the hands of [12] creditors representing \$751,434.75 upon a technicality of the kind presented. In my opinion this is a further attempt upon the part of officers of the Continental Building & Loan Association to control the administration of this estate.

An involuntary proceeding in bankruptcy was brought against the Continental Building & Loan Association in 1912 in this court, and an opposition was entered by it, and the case was referred to me to ascertain and report the facts and my conclusions



thereon. My report was filed on January 16, 1913, in which I found that the association was solvent and had not committed the acts of bankruptcy charged, and the proceeding was dismissed. In my report I considered at length the nature of associations of this character and the rights of the stockholders as creditors in the event of bankruptcy proceedings. I quote the following from page 19 of said report:

“There is no independent stock of this association. Its capital stock consists of the dues paid in by its members. The Land and Building Act as amended (Civil Code, section 634) reads: ‘The capital stock shall consist of the accumulated dues, together with the apportioned profits of the corporation.’ There is also a provision for the usual stockholders’ liability upon debts owing by the corporation to outside creditors.

“In what respect do the stockholders of such an association differ from the stockholders of ordinary commercial corporations?

“The case of *Towle vs. American Building, Loan and Investment Co.*, 61 Fed. 466, Grosscup, District Judge, is a leading case referred to by the courts.

“Concerning the nature of these corporations I quote the following from this decision:

“ ‘These associations are essentially corporate copartnerships. They have no function except to gather together, from small, stated contributions, sums large enough to justify loans. Their officers are the agents of every stockholder, and

whether a stockholder is creditor or debtor depends on whether he has exercised his privilege of borrowing money from the common fund. The insolvency of such an institution is *sui generis*. There can be, strictly speaking, no insolvency, for the only creditors are the stockholders by virtue of their stock. The so-called insolvency is such a condition of the affairs [13] of the association as reduces the available and collectible funds below the level of the amount of stock already paid in. The association is said to be insolvent when it cannot pay back to its stockholders the amount of their actual contributions, dollar for dollar. The association does not deal as a corporate entity with its borrowers as stranger. The by-laws determine who become borrowers, and the officers, who are agents of such borrowers, as well as of the remaining stockholders, in the transaction, simply execute these by-laws. None of the liabilities or maxims, therefore, which apply to contracts between strangers are applicable to these transactions. The transaction of borrowing is not between strangers, or the result of contract or dealing, but is simply the execution of pre-existing rights among the stockholders. I think it plain that, when the condition of the association shows that, instead of making profits, it loses the principal of the contributing stockholders, there is power in a court of equity to wind up its affairs upon purely equitable principles.

“ ‘The inability of the association to proceed

to its expected termination by reason of the impairment of its collectible loans is attributable alike to each stockholder. The officers of the association are their agents, and the results of their investments are alike the fortune or misfortune of each stockholder, whether it be borrower or nonborrower. When a condition thus brought about justifies a court of equity in peremptorily terminating the career of the association, the adjustment should be made as near upon the line of what would take place if the association lived out its life as is possible.'

"I also quote from page 22 of said report as follows:

" 'But there is another principle of these associations to be considered, and out of which a condition of insolvency may arise, peculiar to such associations, and that is the right given by law to every member to withdraw from the association and receive such an amount of what he has paid in, and profits earned, less penalties for withdrawal, provided by law. The right of withdrawal is absolute. While by virtue of his membership he is liable for the debts of the corporation to outside creditors in the proportion represented by his stock, as between the association and himself, the association cannot compel him to complete his stock subscription. There is, therefore, an absolute obligation on the part of the association to pay all members such withdrawal value, and this establishes a condition of debtor and creditor.'



“I also quote from page 23 of said report as follows:

“ ‘To the extent of the obligation of the corporation to pay the withdrawal value of the stock based upon profits actually existing the identity of the corporation is distinguished from that of its members. If the corporation is solvent they can in law or in equity recover such withdrawal value. If the corporation is unable [14] to pay back the principal paid in a state of insolvency exists. In the opinion of the referee the stockholders have provable claims in bankruptcy to this extent, and are entitled to their proportionate share of the profits, if any.’ ” [15]

**By-laws of the Continental Building and Loan Association.**

Authorized Capital \$20,000,000.00

**BY-LAWS**

**CONTINENTAL BUILDING AND LOAN ASSOCIATION OF CALIFORNIA**

**“HOME”**

**Incorporated and Acting Under the Laws of the State of California.**

**Home Office:**

**San Francisco, Cal. [16]**

**Home Office:**

**Market and Church Sts.**

**San Francisco**

**Telephone Special 118**

**CONTINENTAL BUILDING AND LOAN ASSOCIATION OF CALIFORNIA**

**BY-LAWS [17]**

BY-LAWS  
CONTINENTAL BUILDING AND LOAN ASSO-  
CIATION.

Home Office, San Francisco, Cal.

ARTICLE I.

Section 1. The name of this Association shall be the Continental Building and Loan Association, and its principal office shall be in the City and County of San Francisco, State of California.

ARTICLE II.

Section 1. The objects of this Association are to encourage industry and frugality, and to promote thrift and economy among its members by providing a medium through which their savings may be invested to yield the largest returns consistent with absolute safety. [18]

ARTICLE III.

Section 1. Any person may become a member of this Association by subscribing for stock therein and making the first payment of \$1.00 on each share, which shall be for a life membership in the Association, and is transferable at any time on the books of the Association by the payment of a transfer fee of ten cents per share; provided that such application for membership or transfer is made upon blanks furnished by the Association, and is approved by the Board of Directors.

Sec. 2. Corporations and minors may become members and hold stock in the name of a trustee. Married women may hold stock free from all claims and debts of their husbands.

## ARTICLE IV.

Section 1. The affairs of this Association shall be managed and controlled by a Board of five Directors, who shall hold their offices until their successors are duly elected and qualified, and shall fill any vacancies that may exist in the Board. The regular meetings of the Board of Directors shall be held at 11:30 o'clock a. m. every Saturday, at the office of the Association in San Francisco. A majority of the Board of Directors shall constitute a quorum for the transaction of business.

Sec. 2. The Directors shall elect and appoint all officers of the Association and elect the bank or banks, trustt company or trust companies in which all funds, deeds, mortgages, bonds and other papers shall be deposited. They shall audit the accounts of the Secretary and claims or bills against the Association, and shall have access to the books of the Association at all times. All bills certified by them as correct shall be paid without further action when signed by the President and attested by the Secretary.

Sec. 3. The Board of Directors shall have the power to borrow money and secure the payment thereof as they may deem best, said money to bear interest at a rate not exceeding the usual market rate. All profit derived from such borrowed capital shall be treated as earnings to the Classes "A," "F" and "G" Installment and Children's Educational stock.

## ARTICLE V.

Section 1. The elective officers of the Association



shall consist of a President, Vice-President, Secretary and General Manager.

Sec. 2. The President shall preside at all [19] meetings of the Directors, shall sign certificates of stock and orders on the Trustee, and perform such other duties as usually devolve upon the President of a corporation.

Sec. 3. The Vice-President shall perform all duties of the President during his absence.

Sec. 4. The Secretary shall keep correct minutes of the proceedings of the stockholders and the Board of Directors. He shall attest all certificates of stock and all orders drawn upon the Trustee or depository for the payment or appropriation of money ordered by the Board. He shall keep the accounts and all necessary books and papers of the Association, except those in charge of the Trustee. He shall attend to the general correspondence of the Company, and shall have charge of the corporate seal. He shall make a report to the Board of Directors when so required, showing the condition of the Association. He shall have general control and charge of the Association, and shall designate the duties of the employees, subject to the supervision of the Board of Directors.

Sec. 5. The Association shall have a depository and Trustee. All moneys belonging to the Association shall be deposited with the depository. The funds shall be withdrawn only on resolution of the Board of Directors for the following purposes only: Payment on account of loans, payment on account of matured, withdrawn or retired shares, pay-

ment of principal and interest on moneys borrowed, payments of interest on paid-up shares, payment of interest on deposits, payments of taxes, payments of purchase price on foreclosure of property mortgaged, or payments for necessary repairs or improvements on property acquired on foreclosure, and the operating expense of the Association. The Trustee shall have charge of all deeds, bonds, notes, mortgages, deeds of trust, contracts and other securities belonging to the Association, and shall register all paid-up stock certificates, and shall act as Trustee under all trust deeds made to the Association to secure money loaned.

Sec. 6. The General Manager shall have general supervision of the Agency Department, and shall give his entire time and attention to the general welfare of the Association. He shall, when required, make a report to the Board of Directors, in writing or otherwise, showing the work done or being done in his department. It shall also be his duty to visit any or all parts of the territory in which the Association operates, as often as the Directors may deem it necessary to protect the interests of the Association.

[20]

Sec. 7. The Attorneys for the Association shall supervise the examination of all abstracts relating to the real estate offered as security for loans, and shall supervise and inspect the drawing of all papers relating to loans, and see that the same are properly recorded.

## ARTICLE VI.

Section 1. The stock of the Association shall be

divided into eight classes, viz.:

Class "A," Installment stock.

Class "C," Full Paid Non-Participating stock.

Class "D," Mutual Deposit stock.

Class "E," Children's Educational stock.

Class "F," Installment stock.

Class "G," Installment stock.

Class "I," Installment Protected stock.

Class "D C," Guaranteed Maturity stock.

All of the par value of \$100 each.

Sec. 2. Each holder of Class "A" Installment stock shall pay to this Association in advance without notice, on or before the 15th day of each and every month, a monthly installment of sixty cents on each share of said stock held by him or her, for a period not to exceed eighty-four consecutive months, and only until such stock shall by the accumulation of payments and profits become full paid. For the purpose of paying the operating expenses of the Association, there shall be set aside the first payment, and each month the further sum of one-tenth of one per cent on the face of stock then in force. The balance of said fund remaining after providing for the expense of management of the Association shall be transferred to the Loan Fund and be treated as profits.

Sec. 3. Class "D C," or Definite Contract, stock may be issued to borrowers only. In no case shall such stock remain in force after repayment of a loan for which the stock was issued.

Sec. 4. Full paid Non-Participating stock may be issued and sold at par (\$100 per share). The hold-



ers of such stock shall receive a dividend of six per cent per annum, payable semi-annually in cash the first day of January and first day of July of each year, but shall not further participate in the profits. Interest on such stock shall begin the day of the deposit.

Sec. 5. Mutual Deposit stock may be issued to any member of the Association desiring to open a bank account with his own institution; a deposit and check book shall [21] be issued to each member carrying this class of stock.

Sec. 6. Children's Educational stock may be issued by the Association for the purpose of creating a fund for parents or guardians to educate children, or for the purpose of starting them in business. Each holder of Children's Educational stock shall pay in advance to the Association, on or before the 15th day of each and every month, without notice, a monthly installment of sixty cents per share for each share of stock held, for a period not to exceed eighty-four consecutive months. When the stock shall, by the monthly payments and accumulations, become worth one hundred dollars per share, it shall be transferred to Full Paid Participating stock, and thereafter be subject to the by-laws governing Full Paid Participating stock, except that the interest paid in cash semi-annually to holders of Full Paid Participating stock shall be added to the principal and semi-annually compounded, and shall not be withdrawable until the expiration of the time specified in the original certificate of membership. In case the benefactor should desire to cease making

payments on the stock before the expiration of eighty-four months, a written notice of such desire will be deemed sufficient evidence for the Board of Directors not to demand further payments, and no fines shall be exacted after such notice shall have been received, but the fund already created shall be held by the Association in trust until the expiration of the trust agreed upon at the time of subscribing for the stock, when the capital paid in, together with its accumulations, shall be turned over to the proper parties. In case of the death of the beneficiary before the expiration of the agreed trust, it shall be left to the option of the benefactor whether the trust shall terminate or continue. If withdrawn in case of death, the benefactor shall be entitled to the monthly installments paid in, under the same rules that govern Class "A" withdrawals, per Section 11 of this Article. The operating expense that applies to Classes "A" and "B" stock shall also be applicable to this stock. This class of stock shall also be subject to the same charge for expense that governs Classes "A" and "B" stock.

Sec. 7. Each holder of Class "F" stock shall pay into the Association in advance, without notice, on or before the 15th day of each and every month, an installment of one dollar for each and every share of stock so held. Holders of this class of stock can make [22] payments of fifty cents dues per month on each share held if they so elect at the time of subscribing for the stock. For the purpose of paying the operating expenses, there will be charged against this class of stock the first payment of one



dollar per share; the other expenses attached to this class of stock shall be deducted from the earnings of said class of stock. The dividend to be apportioned to this class of stock shall be fixed from time to time by the Board of Directors. Holders of Class "F" stock desiring to borrow on real estate may do so by transferring their Class "F" stock to "D C" stock.

Sec. 8. Each holder of Class "G" Installment stock shall pay into the Association in advance, without notice, on or before the 15th day of each and every month, dues of thirty cents on each share of stock, so held, for a period not to exceed one hundred and twenty consecutive months. For the purpose of paying the operating expenses of the Association, there shall be set aside the first payment and each month the further sum of one-sixteenth of one per cent on the face of such stock in force.

Sec. 9. If in any event, at the expiration of eighty-four months, the payments and accumulations on Class "A" Installments stock do not amount to the face thereof, the same may be surrendered, and the holder thereof shall receive the full amount paid in on the stock, together with the net accumulations, or may leave the same with the Association until sufficient profits accrue to make the stock worth par. In no case shall expense be charged against such stock after eighty-four monthly installments have been paid.

Sec. 10. The holder of either class, except Children's Educational and Class "A" stock, may exchange it at its cash value for stock of either of the



other classes at any time, upon the payment of a transfer fee of \$1.00. Holders of Class "A" and Class "F" stock may reduce their shares at any time after six consecutive monthly payments upon paying a reduction fee of \$1.00.

Sec. 11. All stock shall be absolutely nonforfeitable; any member holding Class "A" stock, and desiring to withdraw from the Association, may do so at any time after making twelve consecutive monthly payments by giving sixty days' notice in writing to the Secretary. The member withdrawing before twenty-four consecutive monthly payments have been made upon his stock shall receive in cash the aggregate sum of such installments, [23] together with six per cent interest, less the expenses per Section 2 of Article 6; after twenty-four installments, the aggregate sum of such installments paid, together with three-fourths of the profits credited thereto, less the expenses per Section 2 of Article 6.

Sec. 12. Full Paid Participating stock may be withdrawn at any dividend date by first giving the Secretary of the Association sixty days' notice in writing of the intention so to do, but if withdrawn before the expiration of one year from date of issue the holder shall receive only the amount paid for same plus the interest collected. If the stock remains with the Association for two years, additional profits, to be fixed by the Board of Directors, may at their discretion be paid on withdrawal; but in no case will the full earnings of the stock be paid on withdrawal unless such stock is withdrawn because of maturity.

Sec. 13. Full Paid Non-Participating stock may be withdrawn after one year on any dividend date by giving the Secretary of the Association sixty days' notice of intention so to do, and the full amount paid for such stock plus six per cent interest to date of such withdrawal shall be returned to such withdrawing member.

Sec. 14. Mutual deposit stock may be used by the members of the Association for depositing money and checking it out at will. Any sums remaining with the Association for a longer term than three months shall bear interest at the rate of five per cent per annum, or such rate as may be fixed by the Board of Directors from time to time, and shall apply to all existing deposits. An account closed between dividend periods shall receive interest up to the last dividend period.

Sec. 15. Children's Educational Stock Certificates will not be issued for a term less than seven years, nor for a longer term than twenty-one years, and may be withdrawn when the child is fifteen, eighteen or twenty-one years of age, as may be agreed at the time of assuming the trust. The amount paid in, plus all net accumulations, shall be returnable at the expiration of the stipulated term, and will be returnable in a lump sum or paid out as the funds may be needed, and the amount remaining with the Association shall bear the mutual deposit rate of interest.

Sec. 16. Holders of Class "F" stock may withdraw their monthly installments of dues at any time on sixty days' notice, but, if withdrawn before twelve consecutive monthly payments have been



made the withdrawal [24] value will be the amount actually paid in as dues. If withdrawn at the end of one year and twelve consecutive monthly payments have been made, the withdrawal value will be the dues paid in together with five per cent interest for the average time. If withdrawn at the expiration of twenty-four consecutive monthly payments of dues or at the end of any annual period thereafter up to and including the sixth consecutive year, the amount paid in as dues together with six per cent interest annually compounded will be the withdrawal value, After the sixth year and until the maturity of the stock the withdrawal value will be the amount of dues paid in together with three-fourths of the accrued profits which shall have been semi-annually apportioned. Each certificate of stock of this class issued shall have the withdrawal value as herein mentioned stamped on its face. In no case shall the first payment of one dollar per share be subject to withdrawal.

Sec. 17. Each holder of Class "G" Installment stock may have the privilege of withdrawal at any time after twelve consecutive monthly installments have been made, on such terms as may be specified from time to time by the Board of Directors. If, in any event, the dues and accumulations do not make this class of stock worth one hundred dollars per share in one hundred and twenty months, the holder at that time shall be entitled to all dues paid in, together with the accumulations, less the expense charged against the stock per Section 8 of this Article.



Sec. 18. In case of the death of a member his legal representatives may continue his stock or exercise the like power of withdrawal.

Sec. 19. Whenever any stockholder or depositor of this Association shall give the notice of withdrawal provided in these by-laws for withdrawing members, and at the end of the time of notice shall fail to withdraw the money represented by said stock or said deposit for a period of three days beyond the time of said notice, then and in that event said stockholder or depositor shall be deemed to have waived and withdrawn said notice of withdrawal and the Association shall treat said stock and said deposit as other stock and funds of the Association wherein no notice of withdrawal shall have been given, and said stockholder or depositor shall not be entitled to withdraw thereafter without giving a new notice of withdrawal as in the first instance. In case a person does not [25] withdraw his stock, he shall not lose any of his dividends provided payments are continued.

Sec. 20. All transfer fees and reduction fees received shall be treated as profits.

Sec. 21. Unless the Board of Directors shall otherwise expressly determine, not more than one-half of the regular monthly receipts shall be applied to paying withdrawals.

Sec. 22. Profits arising from the Full Paid Non-Participating Stock and the Mutual Deposit Stock, after paying the interest and expenses thereon, will be considered profits to the Class "A," "E," "F" and "G" Installment Stock, and shall be semi-annu-

ally added to those classes of stock as additional dividends.

Sec. 23. In case holders of Class "A" or "F" Investment stock should, through sickness, find it impossible to pay their monthly installments of dues, profits will not be added to such stock during such illness, but the holder must furnish the Board of Directors sufficient proof of such inability.

Sec. 24. The Board of Directors may in its discretion create a Reserve Fund from the profits of the Association to an amount not exceeding ten per cent of its real estate holdings.

Sec. 25. Holders of Installment stock may make advance payments on their stock, and, if for a period of six months or more, interest on such advance payments will be allowed at the rate of six per cent per annum for the average time.

Sec. 26. Class "I" stock may be issued to be governed by such rules as the Board of Directors may designate. This class of stock is intended as a combination with Life Insurance to enable the stockholder to mature the stock in case of death.

Sec. 27. Stockholders desiring to transfer their stock from other classes to the Class "I" stock may do so upon payment of one dollar per share transfer or membership fee, said fee being based on the number of Class "I" shares subscribed for, and same may be paid in cash by stockholders or charged against their stock as they may elect.

Sec. 28. A deduction from monthly dues will be made by the Association, which shall be regulated by the Board of Directors and will be called the

“Insurance Fund.” All moneys saved out of said fund, after paying the cost of insurance and expense attached thereto, shall be carried into a fund called “Insurance Reserve Fund,” said fund to be [26] annually credited to each stockholder in the Class “I” stock.

Sec. 29. The “Insurance Reserve Fund” shall not be subject to withdrawal except at maturity of stock.

Sec. 30. The amount paid into the Association, after providing for the Insurance Fund, shall be known as the “Investment Fund.” Said fund shall receive such dividends semi-annually as the Board of Directors may provide.

Sec. 31. Stockholders desiring to withdraw this class of stock may do so after twelve consecutive monthly payments, and shall receive the amount paid into the Investment Fund, together with 6 per cent interest; after forty-eight consecutive monthly payments, the Investment Fund and 50 per cent of the Investment Fund profits; and after sixty consecutive monthly payments, the Investment Fund and 75 per cent of the Investment Fund profits. In all cases less the first payment of \$1.00 per share and any charges that may be chargeable against said fund.

Sec. 32. When on account of extra hazard the Life Insurance Company, or Association, requires the applicant or this Association to sign a due-bill making the amount payable at death less than the face of the certificate of stock, or insurance, the amount agreed to be paid by the Insurance Company



shall be considered the matured value of the stock, and only the actual amount received by the Continental Building and Loan Association, from the insurance company or association, shall be paid to the beneficiaries.

Sec. 33. No Insurance Policy shall be considered delivered until the certificate and pass-book, with the words "This certificate is protected by Life Insurance" printed, stamped or written thereon, shall be actually delivered to the applicant for the combination protected investments, and a statement made by the applicant at the time of delivery that he or she is still in good health. The regular payments must be made on the stock and the applicant be in good standing, and, further, the applicant must have fully complied with the requirements of the Insurance Company.

Sec. 34. Any person subscribing for the Class "I" stock known as "Protected Investments" must be governed by the rules relating to the insurance that are imposed upon this Association by the Insurance Company in which it places the insurance. [27]

Sec. 35. In case of the death of a stockholder in the Class "I" stock the Association shall collect the insurance from the Insurance Company and apply the proceeds to the immediate maturity of the stock, and then pay same to the beneficiaries. The amount standing to the credit of said deceased stockholder on the Association's books, not already in the Insurance Reserve Fund, shall be transferred into the Insurance Reserve Fund for the benefit of the ma-

turing stockholders in Class "I" stock.

Sec. 36. If in case of lack of employment, or through sickness, the Class "I" stockholder finds it impossible to keep up his installments of dues, the Association will keep the insurance in force by applying the Investment Fund toward the payment of the insurance premiums so far as they will extend, at which time the Association's liability toward keeping the policy in force shall cease. But a stockholder can put himself in good standing at any time before final default by paying up all back payments due upon the stock.

Sec. 37. The borrowing members carrying the Class "I" stock, in order to shorten the time of maturity of their stock and repayment of their loans, may make excess payments over and above the regular monthly installments, for the purpose of assisting in paying the life insurance premiums, and in case of death the life insurance shall be applied toward the liquidating of their mortgage.

Sec. 38. All life insurance policies shall be kept in the vaults of the Association at its head office, in the City and County of San Francisco, California.

Sec. 39. In case Installment stockholders do not make their monthly payments when due, a fine may be imposed upon such stock as provided by the State laws of the State of California at the time of the issuance of said stock.

## ARTICLE VII.

### Funds—How Loaned.

Section 1. The funds of this Association shall be loaned each month on such securities as are ap-



proved by the Board of Directors.

Sec. 2. Any member in good standing may borrow an amount not to exceed eighty per cent of the total installments paid on their shares, assigning said shares to the Association as collateral security, and paying such interest as the Board of Directors may determine. [28]

Sec. 3. After three months' membership each holder of Class "A" and "G" Installment stock not in arrears shall be entitled to borrow of the Association a sum equal to the face value of the stock, on assigning their certificate of stock to the Association, which shall be secured by a first lien on real estate, as provided in Section 1 of this Article. In addition to the sixty cents monthly dues on Class "A" and thirty cents on Class "G" stock, such borrower shall pay in advance a maximum of fifty cents interest and a minimum of sixty cents premium, making his total monthly payments \$1.70 for each \$100 borrowed on Class "A" loans, and \$1.40 for each \$100 borrowed on Class "G" loans, provided, however, dues on Class "A" borrowed stock shall not be collectable for a period exceeding eighty-four consecutive months, and on Class "G" not exceeding one hundred and twenty consecutive months. But interest and premium must be paid until stock assigned as collateral security is fully matured. Members desiring to borrow before being a member three months may do so by making three months' payments of dues when desiring to make application for loan.

Sec. 4. Abstract of title must be furnished by



the borrowers, and they must pay the attorney's fees for the examination of the same and all costs incurred in perfecting the loan, recording the mortgage or trust deed, etc. The abstract, as well as other papers offered as evidence of title, shall be held by the Association until loan is repaid, and, if loan is not made, until all expense incurred by the Association in reference thereto is fully paid.

Sec. 5. The borrower may repay his loan at any time on giving thirty days' notice in writing to the Secretary of the Association, on such terms as the Board of Directors may determine.

Sec. 6. The Secretary must have all buildings insured on which mortgages or trust deeds are placed, for the benefit of the Association, against losses by fire, in some company to be approved by the Board of Directors, with loss made payable to the Association as its interest may appear. The cost of such insurance must be paid for by the borrower. All renewed insurance policies must be on file in the general office of the Association at least forty-eight hours before the expiration of the old policy.

Sec. 7. All applications for loans will be filed and acted upon in the order in which they are received. [29]

Sec. 8. The Association may loan its funds on the definite contract plan when the Board of Directors shall deem it to be to the best interest of the Association to do so. Such loans may be repaid at any time on such conditions as the Board of Directors may determine. Such borrowers may make partial

payments on loans, independent of the monthly, payments, and if in even hundreds of dollars, reductions in the monthly payments will be allowed. The consecutive monthly payments per thousand on definite contract loans shall be as follows:

\$26 per mo. per 1,000 maturing in 48 months.

\$22 per mo. per 1,000 maturing in 60 months.

\$19 per mo. per 1,000 maturing in 72 months.

\$17 per mo. per 1,000 maturing in 87 months.

\$16 per mo. per 1,000 maturing in 96 months.

\$15 per mo. per 1,000 maturing in 108 months.

\$14 per mo. per 1,000 maturing in 120 months.

\$13 per mo. per 1,000 maturing in 144 months.

\$12 per mo. per 1,000 maturing in 168 months.

These rules and rates may be modified at any time by the Board of Directors.

Should a member make default in monthly payments on definite contract loans, a penalty of one per cent per month shall be charged against such defaulted payments for each and every month that such default continues.

### ARTICLE VIII.

Section 1. The Board of Directors may in their discretion elect from among the stockholders of the Association an Advisory Board, consisting of three members, whose duty it shall be to counsel and advise with the Board of Directors, inspect the books of the Association at least twice a year, and submit a report of their investigations which shall be published for the benefit of the stockholders of the Association.

Sec. 2. Whenever a sufficient amount of stock

shall have been sold in any community or locality, the stockholders thereof may organize a local Board or Branch of this Association. The officers of the local Branch shall consist of a President, Secretary, Treasurer and not less than three Directors, whose duty shall be to receive and forward applications for membership, to encourage punctual payments of installments, and to advise with the Board of Directors concerning all loans and proposed loans in their locality, as well as the interests of the Association at large. They should correspond freely with the Home Office.

Sec. 3. The agents of the Association are authorized to appoint the first officers of the [30] Local Board, subject to the approval of the Home Office, who shall hold office for the term of one year.

Sec. 4. The Treasurer of the Local Board shall be deemed Treasurer of the stockholders of his locality, and not the agent of the Association.

Sec. 5. Local Boards may choose one or more of their members to visit the Home Office whenever they wish to examine into the conduct of the affairs of the Association.

#### Remittances.

Sec. 6. All remittances for monthly installments, interest and premium, shall be made direct to the Home Office of the Association and shall be deposited by it with the depositary, the Canadian Bank of Commerce, or such other depositary as may be selected by the Board of Directors.

#### Stockholders' Meeting.

Sec. 7. The regular meeting of the stockholders



for the election of the Board of Directors, and the transaction of such other business as may come before it, shall be held on the second Tuesday of August in each year at the Home Office of the Association. A representation of the majority of the stockholders in good standing shall be necessary for the transaction of business at any meeting of the stockholders. At such meetings representation by proxy duly appointed shall be allowed, but such proxies must be filed with the Secretary at least ten days before the annual meeting. The annual meeting of the stockholders shall be held just before the annual meeting of the Board of Directors. Notice of holding the regular meetings of stockholders and directors is hereby dispensed with.

#### ARTICLE IX.

Section 1. The President and Secretary shall sign all satisfaction of mortgages, which shall be sufficient evidence of release, and the Trustee shall, when requested by resolution of the Board of Directors, reconvey all real estate held by it as security for loans.

#### ARTICLE X.

##### Seal.

Section 1. The Company shall have a seal with the words "Continental Building and Loan Association of California," and the date of its incorporation, inscribed thereon. [31]

#### ARTICLE XI.

Section 1. These By-Laws may be amended, repealed or suspended at any time by a unanimous

vote of the Board of Directors elected at any regular or called meeting, but no charge shall be made diverting the Loan Fund of the Association from its present use.

## ARTICLES XII.

Section 1. These By-Laws shall apply only to stock sold after July 17, 1894.

[Endorsed]: Filed Aug. 30, 1915, 10 A. M. A. B. Kreft, Referee. [32]

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*In the District Court of the United States, in and for  
the Northern District of California, First Division.*

No. 9509.

In the Matter of CONTINENTAL BUILDING &  
LOAN ASSOCIATION,

In Bankruptcy,

**Opinion and Order Affirming Order of Referee  
Disapproving Selection of Trustee.**

N. SCHMULOWITZ, Esq., Attorney for Petitioner.

The Continental Building and Loan Association was upon its own application adjudicated a bankrupt on August 9th, 1915. On August 30th, 1915, the creditors appeared by proxy before the referee for the purpose of electing a trustee. The trustee selected at that time was not approved by the referee and another election was held on September 15th 1915. At this election the Anglo-California Trust Company was chosen, but the selection was disapproved by the referee. The order disapproving this

selection has been brought here for review. There is also brought here for review the action of the referee in permitting the shareholders of the bankrupt to vote as creditors for the trustee, and the refusal of the referee to permit the Merchants National Bank, which has a claim against the bankrupt for money loaned to it, to select the trustee, as being the only creditor, within the meaning of the bankrupt act, that appeared and offered to vote at the meeting. The amount of the latter's claim is \$2,611.20, while the claims of the shareholders voting at this election aggregate \$522,437.50. The question as to whether the shareholders can be at the same time creditors is an interesting one, but under the peculiar circumstances of this case need not be definitely determined at this time. The adjudication was had upon the petition of [33] the corporation itself. The shareholders were named in the petition as creditors. If they are not creditors within the meaning of the bankrupt law, the corporation is not insolvent, as the only other claims amount to but \$12,198.90, while the assets of the corporation are scheduled at \$769,508.13. If therefore the shareholders are eliminated as creditors we have these vast assets with which to pay debts of \$12,198.90. No one interested has made any objection to the adjudication and so long as it stands, based on the theory that the shareholders are creditors, they must be regarded as creditors for all purposes. The Merchants National Bank will be paid in full, whatever happens to the shareholders' claims, and the order denying it the right to select the trustee is



affirmed. The selection of the Anglo-California Trust Company was disapproved by the referee, because he found that the selection had been influenced, if not brought about by the officers of the bankrupt, and the attorneys for the bankrupt. His action in so doing is affirmed.

November 9th, 1915.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Nov. 9, 1915, at 3 o'clock and 10 min. P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [34]

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*In the District Court of the United States, in and for  
the Northern District of California, First Division.*

No. 9509.

In the Matter of CONTINENTAL BUILDING AND  
LOAN ASSOCIATION,

In Bankruptcy.

**Petition of Merchants National Bank of San  
Francisco for Appeal and Order Allowing  
Appeal.**

To the Honorable M. T. DOOLING, Judge of the  
District Court of the United States, Presiding  
in the Above-entitled Court:

Merchants National Bank of San Francisco, a corporation, petitioner who filed a petition in the above-entitled cause, praying for a reversal of the order of the referee herein, made on the 15th day of September, 1915, disallowing the petitioner all right to vote

for the office of trustee herein and denying the motion and application of your petitioner that it alone be allowed to vote for the office of trustee, and that all the shareholders and stockholders of said alleged bankrupt be disallowed the right to vote, feeling itself aggrieved by the order made and entered in this cause on the 9th day of November, 1915, in and by which order the said rulings and each of them, of said referee were approved and confirmed, does hereby appeal from said order of the above-entitled Court to the United States Circuit Court of Appeals, for the Ninth Circuit, for the reason specified in the assignment of errors filed herein and does hereby respectfully pray that this, its petition, for said appeal, be allowed and that a transcript of the record, proceedings and papers, upon which said order was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit. And said petitioner, desiring to supersede any and all further proceedings in said cause, [35] hereby tenders a bond in such amount as the Court may require for such purpose and prays that with the allowance of said appeal a supersedeas issue.

DATED November 19th, 1915.

R. P. HENSHALL,

Attorney for Merchants National Bank of San Francisco.

On reading and filing the above petition of Merchants National Bank of San Francisco and the assignment of errors presented therewith, it is ORDERED that said appeal be allowed as prayed for and that said appeal shall operate as a supersedeas

and shall stay all further proceedings in said cause, upon the filing by said petitioner of a bond in the sum of \$30,000.00, with sufficient surety to be approved by this Court.

Done and dated in open court this 19 day of November, 1915.

M. T. DOOLING,  
District Judge.

[Endorsed]: Presented in Open Court and Filed Nov. 19, 1915, at 10 o'clock and 30 min. A. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.  
[36]

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*In the District Court of the United States, in and for  
the Northern District of California, First Division.*

No. 9509.

In the Matter of CONTINENTAL BUILDING AND  
LOAN ASSOCIATION,

In Bankruptcy.

**Assignment of Errors.**

Now comes petitioner and appellant herein, Merchants National Bank of San Francisco, and files the following assignment of errors upon which it will reply upon its appeal from the order made by this Honorable Court on the 9th day of November, 1915, in the above-entitled cause, as follows:

I.

Said referee and said District Court erred in holding that your petitioner was not the only creditor present who was entitled to vote for the office of trustee.



## II.

Said referee and said District Court erred in denying the motion of your petitioner that no other persons present, other than your petitioner, be allowed to vote for the office of trustee.

## III.

Said referee and said District Court erred in allowing persons claiming to be creditors of said bankrupt, who were stockholders and members thereof, to vote for the office of trustee of said bankrupt corporation.

## IV.

Said referee and said District Court erred in excluding your petitioner herein from its right to vote for the office of said trustee. [37]

## V.

Said District Court erred in deciding that it was unnecessary to definitely determine at this time whether the shareholders of said Continental Building and Loan Association were creditors.

## VI.

Said District Court erred in holding that the alleged bankrupt could, by naming its shareholders in its petition in voluntary bankruptcy, establish or create their status as creditors of the Association.

WHEREFORE, by reason of the errors assigned, appellant prays that said order of November 9th, 1915, be reversed and that such further proceedings be had thereon according to law.

R. P. HENSHALL,

Attorney for Petitioner and Appellant Merchants  
National Bank of San Francisco.

[Endorsed]: Presented in open court and filed Nov. 19, 1915, at 10 o'clock and 30 Min. A. M. W. B. Maling Clerk. By Lyle S. Morris, Deputy Clerk.  
[38]

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*In the District Court of the United States, in and for  
the Northern District of California, First Division.*

No. 9509.

In the Matter of CONTINENTAL BUILDING &  
LOAN ASSOCIATION,

In Bankruptcy.

**Bond.**

KNOW ALL MEN BY THESE PRESENTS:  
That, Whereas, the Merchants' National Bank of San Francisco, a corporation has appealed to the United States Circuit Court of Appeals, for the Ninth Circuit from an order of the above-entitled court made and entered herein on the 9th day of November, 1915, refusing the said corporation the exclusive right to vote for trustee in bankruptcy; and,

WHEREAS, the said corporation desires, during the progress of the said appeal, to stay all proceedings in the above-entitled matter; and,

WHEREAS, the above-entitled court made an order herein on the 19th day of November, 1915, granting a stay of such proceedings providing the said Merchants' National Bank of San Francisco, a corporation, filed in the above-entitled matter, a bond approved by the above-entitled court in the sum of \$30,000;

NOW, THEREFORE, we, the said Merchants, National Bank of San Francisco, a corporation, as principal, and Illinois Surety Company, a corporation, as surety, in consideration of such stay of proceedings, and of the premises, jointly and severally undertake and promise that in case the said order be affirmed by the said Circuit Court of Appeals, or the said appeal be withdrawn or dismissed, we will pay all costs which may be awarded by the said Circuit Court of Appeals against said Merchants National Bank of San Francisco, a corporation, as such appellant, and all [39] damages that the above-named bankrupt and the estate of the bankrupt, and the creditors of the bankrupt, and the stockholders of the bankrupt, and the shareholders of the bankrupt, and each and all of said persons, may sustain by reason of the said appeal, such damages to be assessed by the above-entitled court and to be paid to such persons as the above-entitled court may direct, such costs and damages not to exceed the said sum of \$30,000.

IN WITNESS WHEREOF, the said Merchants National Bank of San Francisco, a corporation, and the said Illinois Surety Company, a corporation, have hereunto set their hands and affixed their seals by their respective officers duly authorized thereto



by their respective boards of directors, this 29th day of November, 1915.

MERCHANTS NATIONAL BANK OF SAN  
FRANCISCO,

By W. W. JONES,  
Its Cashier.

ILLINOIS SURETY COMPANY,  
By CHARLES T. HUGHES,  
Its Attorney in Fact. [Seal]

The foregoing Bond is approved. Let it be filed.

M. T. DOOLING,  
U. S. District Judge.

State of California,

City and County of San Francisco,—ss.

On this 29th day of November in the year one thousand nine hundred and fifteen before me, R. H. Jones, a notary public in and for the said city and county, residing therein, duly commissioned and sworn personally appeared Charles T. Hughes known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Illinois Surety Company, and he acknowledged to me that he subscribed the name of Illinois Surety Company thereto as principal and his own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the city and county of San Francisco the day and year in this certificate first above written.

[Seal] R. H. JONES,

Notary Public, in and for the City and County of  
San Francisco, State of California.

My commission expires Dec. 20, 1917.

[Endorsed]: Filed Dec. 6, 1915, at 11 o'clock and — Min. A. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [40]

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**[Certificate of Clerk U. S. District Court to Transcript of Record.]**

I, Walter B. Maling, clerk of the District Court of the United States of America for the Northern District of California, do hereby certify that the foregoing 40 pages, numbered from 1 to 40, inclusive, contain a full, true and correct Transcript of certain records and proceedings, in the Matter of Continental Building & Loan Association, in Bankruptcy, Number 9509, as the same now remain on file and of record in the office of the clerk of said District Court; said Transcript having been prepared pursuant to and in accordance with appellant's and appellee's praecipes (copies of which are embodied in this transcript), and the instructions of attorney for appellant herein.

I further certify that the costs for preparing and certifying the forgoing transcript on appeal is the sum of Twenty-Two Dollars and Sixty Cents (\$22.60), and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the original citation on appeal, issued herein (page 42).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 24th day of December, A. D. 1915.

[Seal]

WALTER B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled  
12/24/15. C. W. C.] [41]

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**Citation on Appeal.**

UNITED STATES OF AMERICA,—ss.

The President of the United States,

To CONTINENTAL BUILDING & LOAN  
ASSOCIATION, and NAT SCHMULO-  
WITZ, its Attorney,

To GEORGE W. MORDECAI, in *pro. per.* and  
Appearing for JAMES McCULLOUGH,

To R. G. HUNT, Attorney for Certain Persons  
Claiming to be Creditors,

To W. C. CAVITT, Attorney for Certain Per-  
sons Claiming to be Creditors,

To W. D. MANSFIELD, Attorney for Certain  
Persons Claiming to be Creditors,

To J. S. HUTCHINSON, Attorney for Certain  
Persons Claiming to be Creditors,

To J. G. de FOREST, Attorney for Certain  
Persons Claiming to be Creditors,

To B. M. AIKINS, Attorney for Claimants  
WILSON, et al,

To SIDNEY M. EHRMAN, Attorney for Cer-  
tain Persons Claiming to be Creditors,



To HUGO D. NEWHOUSE, Attorney for Certain Persons Claiming to be Creditors,

To JOHN YULE, Attorney for Certain Persons Claiming to be Creditors, and

To Each and All Other Persons and Stockholders, Claiming to be Creditors herein,

**GREETING:**

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal entered of record in the clerk's office of the United States District Court for the [42] Northern District of California on November 19, 1915, wherein Merchants National Bank of San Francisco, a corporation, who filed a petition in the matter of Continental Building and Loan Association, a corporation, bankrupt, pending in said court, for an order permitting it to vote for the office of trustee and disallowing the right of all shareholders of said Continental Building and Loan Association, claiming to be creditors, to vote for said office of trustee, pursuant to a petition to review the ruling of the referee adverse to said Merchants National Bank of San Francisco in that particular, is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against said appellant, as in the said order allowing appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable M. T. DOOLING,  
United States District Judge for the Northern Dis-  
trict of California, this 26th day of November, 1915.

M. T. DOOLING,

United States District Judge. [43]

Service of the foregoing Citation is hereby ad-  
mitted this 26 day of November, 1915,

CONTINENTAL BUILDING & LOAN  
ASSOCIATION,

By NAT SCHMULOWITZ,

Its Attorney.

GEORGE W. MORDECAI,

In *pro. per.* and Appearing for JAMES McCUL-  
LOUGH.

J. S. HUTCHINSON,

Attorney for Certain Persons Claiming to be Credi-  
tors.

R. G. HUNT,

Attorney for Certain Persons Claiming to be Credi-  
tors.

WALTER D. MANSFIELD,

Attorney for Certain Persons Claiming to be Credi-  
tors.

HUGO D. NEWHOUSE,

Attorney for Certain Persons Claiming to be Credi-  
tors.

SIDNEY M. EHRMAN,

Attorney for Certain Persons Claiming to be Credi-  
tors.

B. M. AIKINS,

Attorney for Claimants Wilson, et al.

J. G. DE FOREST,

Attorney for Certain Persons Claiming to be Creditors.

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Attorney for Certain Persons Claiming to be Creditors.

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Attorney for Certain Persons Claiming to be Creditors. [44]

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[Endorsed]: Original. No. 9509. United States District Court Northern District of California First Division. In the Matter of Continental Building and Loan Association, in Bankruptcy. Citation on Appeal. Filed at 3 o'clock and 30 Min. P. M. Dec. 3, 1915. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [45]

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*In the United States District Court, in and for the Northern District of California, First Division.*

No. 9509.

In the Matter of CONTINENTAL BUILDING & LOAN ASSOCIATION,

In Bankruptcy.

**Affidavit of Service [of Citation on Appeal].**

United States of America,  
State of California,

Northern District of California,—ss.

Lester Alexander, being first duly sworn, deposes and says:

That he is over the age of eighteen years, a citizen of the United States and not a party to the above-



entitled action; that on the 26th day of November, 1915, at the city and county of San Francisco, State of California, he personally served the annexed citation upon W. C. Cavitt, attorney at law, who appears in the above-entitled action for certain persons claiming to be creditors, and whose office is at room No. 422, Rialto Building, in the city and county of San Francisco; that said W. C. Cavitt declined to admit personal service of said citation at the time and that affiant thereupon left with him a true copy of the annexed citation.

LESTER ALEXANDER.

Subscribed and sworn to before me this 3d day of December, 1915.

[Seal] CHARLES R. HOLTON,  
Notary Public, in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Original. No. 9509. United States District Court, Northern District of California, First Division. In the Matter of Continental Building and Loan Association, in Bankruptcy. Citation and Affidavit of Service. Filed at 3 o'clock and 30 min. P. M. Dec. 3, 1915. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk.

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[Endorsed]: No. 2684. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Continental Building and Loan Association, Bankrupt. Merchants National Bank of San Francisco, a Corporation, Appellant, vs. The Continental Building and Loan Association, a Corporation et al., Appellees. Transcript of Record. Upon Appeal

from the United States District Court for the Northern District of California, First Division, and in Support of a Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise in Matter of Law, an Order of Said District Court.

Filed December 24, 1915.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

MERCHANTS NATIONAL BANK OF SAN FRANCISCO (a corporation),

*Petitioner,*

VS.

THE CONTINENTAL BUILDING AND LOAN ASSOCIATION (a corporation) et al.,

*Respondents,*

In the Matter of Continental Building and Loan Association, Bankrupt.

## BRIEF FOR APPELLANT AND PETITIONER.

Filed

MAR 24 1916

F. D. Monckton

R. P. HENSHALL,  
*Attorney for Appellant  
and Petitioner.*

*Filed this*.....*day of March, 1916.*

*FRANK D. MONCKTON, Clerk.*

*By*.....*Deputy Clerk.*





No. 2684

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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MERCHANTS NATIONAL BANK OF SAN FRANCISCO (a corporation),

*Petitioner,*

VS.

THE CONTINENTAL BUILDING AND LOAN ASSOCIATION (a corporation) et al.,

*Respondents,*

In the Matter of Continental Building and Loan Association, Bankrupt.

## BRIEF FOR APPELLANT AND PETITIONER.

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### Statement of the Case.

This is a petition to revise, in matter of law, an order of the United States District Court, Northern District of California, confirming a ruling of the referee in bankruptcy, denying an application by the Merchants National Bank that it be permitted to vote as a creditor for the office of trustee of the bankrupt, and that all other persons, claiming to be

creditors, who are stockholders of the bankrupt, be denied the right to vote. The petition is taken under §24b of the Bankruptcy Act; but as there is some question whether the order is not appealable under §24a, §25a, an appeal was also perfected, in accordance with those sections.

The facts of the case are as follows: On August 9, 1915, the Continental Building and Loan Association was adjudged a bankrupt in the court below. On that day all further proceedings in the matter were referred to the referee in bankruptcy for the proper district, Hon. Armand B. Kreft. The petitioner and appellant is a national bank, and held a claim against the bankrupt, unsecured, based on a promissory note for \$2,511.20, on account of money loaned (p. 2). This claim was presented, filed, proved and allowed by the referee (p. 3); and a proxy in due form was executed authorizing its attorney to vote the claim at any meeting held for the election of a trustee (p. 3).

On September 15, 1915 (p. 4), the first meeting of creditors of the bankrupt was held before the referee, at which meeting the appellant and petitioner attempted to vote its claim. At this meeting the only other creditor of the bankrupt present was the Pacific Gas and Electric Co. All the other persons present, claiming to be creditors, were stockholders and members of the bankrupt and their claims to be creditors arose out of their ownership of the stock of the bankrupt and not otherwise (p. 4). The Continental Building and Loan Associa-



tion is a building and loan association organized pursuant to the provisions of Part VI, Title XVI, of the Civil Code of California, and is a mutual corporation; and all such persons were stockholders or members of it, as required by law.

At the meeting referred to the appellant moved the referee that any and all claimants, who were stockholders or members of the association-bankrupt, be denied the right to vote (p. 4-5), upon the ground that they were not creditors within the meaning of the bankrupt law, and held no provable claims as such. The referee ruled that each such stockholder or member had the right to vote, and, furthermore, refused appellant and petitioner the right to vote as a creditor at all (p. 5-6).

The appellant and petitioner excepted to this ruling and brought it before the District Court on review, where it was affirmed (p. 59). The opinion of the District Court is in the record (*id.*). From this order the case comes up to this court for determination.

The assignments of error (p. 63), both on the appeal and in the petition (p. 27), raise substantially the same question, which is one of law,—Are the shareholders of a building and loan association creditors of a bankrupt building and loan association, by reason of their ownership of stock in it, as they hold provable claims entitling them to vote for the office of trustee within the meaning of the bankruptcy act? The specific specifications in that regard are as follows:

## Assignment of Errors.

*In the District Court of the United States,  
in and for the Northern District of  
California, First Division*

No. 9509

<p>In the Matter of</p> <p>CONTINENTAL BUILDING AND LOAN ASSOCIATION,</p> <p style="text-align: right;">In Bankruptcy.</p>
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### ASSIGNMENT OF ERRORS.

Now comes petitioner and appellant herein, Merchants National Bank of San Francisco, and files the following assignment of errors upon which it will rely upon its appeal from the order made by this honorable court on the 9th day of November, 1915, in the above-entitled cause, as follows:

#### I.

Said referee and said District Court erred in holding that your petitioner was not the only creditor present who was entitled to vote for the office of trustee.

#### II.

Said referee and said District Court erred in denying the motion of your petitioner that no other persons present, other than your petitioner, be allowed to vote for the office of trustee.

#### III.

Said referee and said District Court erred in allowing persons claiming to be creditors of said

bankrupt, who were stockholders and members thereof, to vote for the office of trustee of said bankrupt corporation.

#### IV.

Said referee and said District Court erred in excluding your petitioner herein from its right to vote for the office of said trustee.

#### V.

Said District Court erred in deciding that it was unnecessary to definitely determine at this time whether the shareholders of said Continental Building and Loan Association were creditors.

#### VI.

Said District Court erred in holding that the alleged bankrupt could, by naming its shareholders in its petition in voluntary bankruptcy, establish or create their status as creditors of the association.

Wherefore, by reason of the errors assigned, appellant prays that said order of November 9th, 1915, be reversed and that such further proceedings be had thereon according to law.

R. P. HENSHALL,

Attorney for Petitioner and Appellant,  
Merchants National Bank of San  
Francisco.

(Endorsed): Presented in open court and filed Nov. 19, 1915, at 10 o'clock and 30 min. A. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.



The case presents an interesting, as well as an important question of law under the Bankrupt Act, as noted by the lower court when it said that "the question as to whether the shareholders can be at the same time creditors is an interesting one" (p. 60). The order sought to be reviewed here should be reversed for the following reasons:

I. A shareholder of a corporation is a distributee of its assets, after all claims against the corporation are paid, and it is legally impossible for such a shareholder, pursuant to the transaction by virtue of which he becomes a shareholder, to be a creditor of the corporation, within the meaning of the bankrupt act.

II. No person can vote for the office of trustee unless he has a provable claim against the bankrupt; and shareholders of a corporation do not possess, by virtue of their shareholdings, provable claims against the bankrupt within the meaning of the bankrupt act.

III. The fact that the assets to be administered upon in the bankrupt court greatly exceed the value of the provable claims against the bankrupt, does not deprive the only creditors who have provable claims from electing a trustee for the bankrupt, and administering upon his estate until they are paid.

IV. The decisions of the courts are uniformly to the effect that stockholders in a building and loan association are not creditors.

## I.

A SHAREHOLDER OF A CORPORATION IS A DISTRIBUTE OF ITS ASSETS, AFTER ALL CLAIMS AGAINST THE CORPORATION ARE PAID, AND IT IS LEGALLY IMPOSSIBLE FOR SUCH A SHAREHOLDER, PURSUANT TO THE TRANSACTION BY VIRTUE OF WHICH HE BECOMES A SHAREHOLDER, TO BE A CREDITOR OF THE CORPORATION, WITHIN THE MEANING OF THE BANKRUPT ACT.

The proposition of law contained in the foregoing point is self-evident and we suppose will not be disputed, but a word of explanation may not be inappropriate. Stockholders of a corporation are not creditors of the corporation any more than is an heir of a decedent a creditor of his estate, though both may possess enforceable obligations. The relation of debtor and creditor is limited in its legal definition, and does not include a relation which merely establishes the right to some remedy to enforce an obligation from one person to another. In its use in bankruptcy it is specially defined, as we shall hereafter show.

A stockholders of a corporation is not a creditor of it, within either the meaning of the Bankrupt Act or within the general acceptation of the term "debtor" and "creditor"; *he is a mere distributee of its assets after the prior payment of debts to creditors.* In other words, he is entirely without any claim whatever until the creditors are paid, and it is in consequence, a contradiction of the premises on which his relations to the corporation is founded, to speak of him as a creditor of the corporation. It is well established law that shareholders of a corporation are not creditors but merely distributees

thereof. Even preferred or guaranteed shareholders are not such creditors, and *afortiori* ordinary shareholders could not be so.

See

*4 Thompson on Corporations*, § 3607, §3608;  
*Miller v. Ratterman*, 24 N. E. 496;  
*Heller v. Nat'l Bank*, 89 Ind. 603; 45 L. R. A.  
 438;  
*Mercantile Trust Co. v. Baltimore & Ohio*  
*R. R.*, 82 Fed. 360;  
*Nickols v. New York, etc., R. R. Co.*, 15 Fed.  
 575.

The latter case is approved on this point though reversed on others in 119 U. S. 296.

In *Warren v. King*, 108 U. S. 398, 399, it was said:

A person “*cannot be both creditor and debtor by virtue of his ownership of stock.*”

The only sense in which a stockholder of a corporation may be said to be (and then erroneously) a creditor was pointed out by the late A. C. Freeman in a note to *Heller v. National Bank* in 73 Am. State Rept. 213, in which he said:

“There is one sense in which stockholders, common as well as preferred, are creditors. It is in the sense that corporations include all its capital stock among its liabilities, but it is a liability which is postponed to every other liability. \* \* \* In the ordinary sense, however, a stockholder can not be a creditor of the corporation by virtue of his ownership of stock.” Citing *Belfast, etc., R. R. v. Belfast*, 77 Maine 445.



In the present case, all of the stockholders of the alleged bankrupt sought to vote as creditors, and their claim to be such creditors *arose out of their ownership of stock and not otherwise*, and in the sense used by Mr. Freeman in the quotation just given, they are creditors. But they are not creditors in the general acceptance of the term, and particularly are not such within the meaning of the Bankrupt Act, and it is respectfully submitted that the conclusion of the referee and of the District Court to the contrary in that respect was clearly erroneous.

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## II.

**NO PERSON CAN VOTE FOR THE OFFICE OF TRUSTEE UNLESS HE HAS A PROVABLE CLAIM AGAINST THE BANKRUPT; AND SHAREHOLDERS OF A CORPORATION DO NOT POSSESS, BY VIRTUE OF THEIR SHAREHOLDINGS, PROVABLE CLAIMS AGAINST THE CORPORATION WITHIN THE MEANING OF THE BANKRUPT ACT.**

1. Under the Bankrupt Act no person, even though he may be at common law a creditor of the bankrupt, may vote for the office of trustee unless he possess a provable claim. The Bankrupt Act is quite specific on this point. Provable claims are specified in §63 of the act, and in subdivision "b" of §59 it is provided "That three or more creditors who have provable claims" may file an involuntary petition. In order, therefore, for a creditor to vote for the office of trustee, he must possess a claim which would entitle him to file an involuntary petition. Under §63 there are four classes of provable

claims. The first subdivision relates to fixed liabilities, the second and third to claims for taxable costs, the fourth subdivision refers to debts founded upon an open contract or upon a contract express or implied; the fifth and last refers to provable claims reduced to judgment after the filing of the petition.

Now if the stockholders of a corporation—bankrupt—are to be regarded as creditors holding provable claims, it must be under either subdivisions one or four just cited. And it should never be forgotten that it has been decided by the ultimate authority that the claims specified in subdivision four,—claims founded upon express or implied contracts,—must nevertheless be of the character of a fixed liability, as specified in subdivision one, at the commencement of the bankruptcy proceedings. This was directly adjudged in *Dunbar v. Dunbar*, 190 U. S. 340.

It follows, therefore, from this that provable claims under subdivisions one and four, meaning debts founded upon an open account, must possess a fixed liability at the time of the commencement of the bankruptcy proceedings.

Now it is clear than the claims of the stockholders against the corporation do not fall within this requirement of the statute, for *none of them can be regarded as a fixed liability at the time of the commencement of the proceedings.*

*Vide* Judge Gilbert's opinion in *Cohnan v. Wilhoft*, quoted *infra*.

Any liability that the corporation was under to its stockholders at the time of the commencement of the bankruptcy proceedings, under the authorities stated under Part I,—if a liability at all,—was one of a contingent character, and was not provable in bankruptcy.

It is well settled that contingent claims are not provable in bankruptcy.

*Dunbar v. Dunbar, supra;*

*In re Ells*, (D. C. Mass. 1900) 98 Fed. 967;  
3 A. B. R. 564;

*In re Arnstein*, (S. D. N. Y. 1899) 101 Fed.  
706; 4 A. B. R. 246;

*In re Mahler*, (E. D. Mich. 1900) 105 Fed.  
428; 5 A. B. R. 457;

*In re Shaffer*, (D. C. Mass. 1903) 124 Fed.  
111; 10 A. B. R. 633;

*Watson v. Merrill*, (C. C. A. 8th Cir. 1905)  
136 Fed. 359; 14 A. B. R. 453;

*In re Ellis*, (C. C. A. 6th Cir. 1906) 143 Fed.  
103; 16 A. B. R. 221;

*In re Imperial Brewing Co.*, (W. D. Mo.  
1906) 143 Fed. 579; 16 A. B. R. 110;

*In re Pittsburg Drug Co.*, (W. D. Pa. 1908)  
164 Fed. 482; 20 A. B. R. 227;

*In re Collignon*, (N. D. N. Y. 1900) 4 A. B. R.  
250;

*Clemmons v. Brinn*, (N. Y. 1901) 7 A. B. R.  
714;

*Evans v. Lincoln Co.*, (1903) 10 A. B. R. 401,  
204 Pa. St. 448, 54 Atl. 321.



The distinction in this regard is, we think, well illustrated by the problems which arise under renting contracts. Rent due at the time of the filing of the petition constitutes a provable claim, but rent to become due, cannot be proved for the reason that it was not, when the bankruptcy occurred, a fixed liability.

Sec. 59, subd. "b."

*In re Jefferson*, (D. C. Ky. 1899) 93 Fed. 948;

*In re Ells*, (D. C. Mass. 1900) 98 Fed. 967;

3 A. B. R. 546;

*In re Arnstein*, (S. D. N. Y. 1899) 101 Fed. 706;

*In re Mahler*, (E. D. Mich. 1900) 105 Fed. 428;

*Atkins v. Wilcox*, (5th Cir. 1900) 105 Fed. 595, 44 C. C. A. 628, 53 L. R. A. 118;

*Wilson v. Pennsylvania Trust Co.*, (C. C. A. 3d Cir. 1902) 114 Fed. 742.

It is clear that the liability of the corporation here to its stockholders, is wholly of a contingent character. The amount of that liability is not capable of definite ascertainment. Like the annuity involved in the case of *Dunbar v. Dunbar*, *supra*, the actual value of what is due at the present time, can not be determined, and this is particularly so by virtue of the mutual character of the concern and the quasi-partnership relations existing between the stockholders. Such liability is simply the continuing obligation of the company to perform its contract which may result in the future in a liability

*in a definite amount*, becoming fixed upon some condition which may or may not be performed, taking place,—the commonest form of a contingent liability.

The decision of this court in the recent case of *Colman v. Withoft*, 195 Fed. 205, so fully covers and exhausts this whole subject that it is deemed advisable by us to quote the opinion in full, especially in view of the fact that it bears upon some other branches of the case. The opinion of Judge Gilbert is as follows:

“The date of filing this petition in bankruptcy is intended to mark the line of separation between debts that are provable and those that are not provable against the bankrupt’s estate. Those that are not provable remain subsisting obligations of the bankrupt, and he is not released therefrom by his discharge. The adjudication of bankruptcy does not dissolve contractual relations between the bankrupt and others. It takes from him his property and devotes it to the payment of debts which are provable under sections 63a and 63b of the bankruptcy act, but it does not absolve him from the obligations of contracts. Remington on Bankruptcy, Sec. 2729, and cases there cited.

“While a contract to pay rent under a lease is not terminated by bankruptcy, the rent thereafter to accrue is not a provable debt against the estate. *Watson v. Merrill*, 136 Fed. 359, 69 C. C. A. 185, 69 L. R. A. 719; *In re Roth & Appel*, 181 Fed. 667, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270; *Atkins v. Wilcox*, 105 Fed. 595, 44 C. C. A. 626, 53 L. R. A. 118; *In re Rubel et al* (D. C.) 166 Fed. 131; *Loveland on Bankruptcy* (3rd Ed.) 365. But the claim of appellant in this case, although it had its origin in the obligation of the bankrupt to pay

rent which accrued after the filing of the petition, is not, as it is presented, a claim for rent; but it is one that arises out of the contract of two lessees, jointly liable for rent, whereby one thereof, the bankrupt, agreed to reimburse the other for all the payments which it might make in excess of one-half of the rental, and to pay it one-half of such sum as it might be required to pay in gross, not to exceed \$100 per month for the unexpired term, to obtain a rescission of the lease. Is such a claim provable against the estate?

“It is held by the decided weight of authority that subdivisions 1 and 4 of section 63a of the Bankruptcy Act, are in *pari materia*, and that the words ‘absolutely owing at the time of the filing of the petition against him’ are to be read into subdivision 4. In *re* Roth & Appell, 181 Fed. 667, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270; In *re* Swift, 112 Fed. 315, 50 C. C. A. 264; In *re* Adams, (D. C.) 130 Fed. 381; In *re* Burka, (D. C.) 104 Fed. 326. It is apparent that the appellant’s claim was not a debt due and owing at the time when the petition was filed, but that it was contingent; that is to say, all the facts necessary to be shown to establish the bankrupt’s liability to the claimant had not occurred before the petition in bankruptcy was filed.

“ ‘Where a liability of the bankrupt is not fixed so that it can be liquidated by legal proceedings instituted at the time of bankruptcy, it is not a debt. It is deemed so far contingent that it cannot be proved in bankruptcy, nor is it released by the bankrupt’s discharge. A sum of money payable upon a contingency is not provable because it does not become a debt until the contingency has happened.’ Loveland on Bankruptcy (3d Ed.), 324.”



In *Dunbar v. Dunbar*, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084, it is said:

“ ‘We do not think that by the use of the language in section 63a, it was intended to permit proof of contingent debts or liabilities or demands, the valuation or estimation of which it was substantially impossible to prove.’ ”

“ ‘At the time when the petition was filed, not only was the bankrupt not indebted to the appellant, but it could not then be known that he ever would be indebted to it, either for money to be paid for rent or for money to be paid for the rescission of the lease. As far as the rent was concerned, there were the contingencies that the lessee might cancel the lease, or that the trustee in bankruptcy might elect to pay the rent, or that the appellant might fail to pay more than its half thereof. As to the agreement looking to a rescission of the lease, there were the contingencies that the agreement which was without consideration, might be revoked by either party thereto before it was acted upon, or that it might be impossible to secure rescission on the terms stipulated by the bankrupt.’ ”

“ ‘The decision in *re Bingham* (D. C.), 94 Fed. 796, is in point. At the time of the filing of the petition in that case the bankrupt and one Hartshorn were jointly liable on a note to a bank, but as between themselves each owed one-half the amount due thereon. The bank proved its claim on the note, and the other party to the note thereafter took up the note and proved his claim against the estate. The court said:

“ ‘The bankrupt was bound to save him harmless from this part of the debt, and has not done so; but the indebtedness has occurred since the filing of the petition, and until that time Hartshorn had no provable claim on that account. By this bankruptcy act all claims turn

on their status at the time of the filing of the petition.'

"An apparent exception to the rule that contingent claims may not be proved under section 63a is the case of an indorser of the commercial paper of a bankrupt not due at the time of the filing of the petition, but whose liability as indorser thereafter becomes fixed. *Moch v. Market Street Bank*, 107 Fed. 897, 47 C. C. A. 49; *In re Semmer Glass Co.*, 135 Fed. 77, 67 C. C. A. 551; *In re Smith (D. C.)*, 146 Fed. 923. But it may be doubted whether the liability of an indorser in that class of cases is in any true sense contingent. The extent of his liability is at all times known, for it is measured by the note itself. Upon the adjudication of bankruptcy it would seem that there is an end to the contingency that the bankrupt himself may pay the note, and that there remains between that date and the maturity of the indorser's liability nothing but a question of time. But in view of these decisions, they are not applicable to the present case, for here there was a contingency, not only as to the amount of the liability, but as to its existence. The order of the District Court is affirmed."

It is clear, we think, that within the controlling principle announced in the decision that the liability of a corporation to its stockholders is not fixed, and is not owing, within the meaning of the bankrupt act. It could not in consequence be a provable debt, and not being a provable debt, a stockholder is not a creditor and is not qualified to vote for a trustee.

2. The claims of the stockholders against a corporation upon its dissolution, whether that dissolution be voluntary or involuntary, through bank-

ruptcy or through a receiver, are such as give rise to questions cognizable only in a court of equity.

Now, a bankrupt court exercising powers in bankruptcy, has equitable powers, but the jurisdiction of the courts of equity, as such, has not been conferred upon courts of bankruptcy. It will not be pretended, for example, that a stockholder might go into a court of bankruptcy upon equitable principles and seek to wind up the corporate affairs. An example taken from the bankrupt act in dealing with the subject of partnership will illustrate this point. The bankrupt law provides a method for the payment, first, of the general creditors and for the liquidation of the claim of the various partners with each other, and against the fund, if there be any.

#### Section 5, f. g. and h.

From this, however, it could not be inferred that one of the partners having a claim against the partnership assets, will be a proper person to put the partnership into bankruptcy. Indeed, by inference it has been so held, where it has been determined that the inherent right of a solvent partner to close up the affairs of the bankrupt must be recognized by the court of bankruptcy.

See: *In re Junck*, 169 Fed. 481.

On the other hand, it is clear that the Bankrupt Act did not intend to interfere with the right of the partners to close up the partnership. The pendency of a suit for the dissolution of the partnership could not deprive the creditors of the right



to put the partnership into bankruptcy but the only persons vested with the right to obtain such an adjudication are the general creditors.

Under subdivision "f" of Section 5 the Court is authorized to distribute the partnership assets among the partners and if it were not for this direct provision in the Bankrupt Act, the court would have no authority whatever over the relations of the partners between themselves. It was doubtless deemed advisable by Congress to vest the bankruptcy court with authority to determine this non-bankrupt matter. In this particular instance and under a familiar rule the express grant of authority is an implied negation of the authority in all other instances.

3. Still another illustration fortifies our contention in this connection. The Bankrupt Act specifies numerous acts of bankruptcy for which the bankrupt could be put into insolvency. Among these are briefly stated the conveyance of property with intent to defraud creditors, without regard to even the actual insolvency of the bankrupt; admission of inability to pay debts; appointment of a receiver; suffering a preference to be made in favor of one creditor over another while insolvent, and other instances.

Now, none of these instances are or can be made applicable to the case of a stockholder of a corporation. How could a stockholder, for example, allege that the corporation had conveyed away its property with intent to defraud its stockholders,

*so as to give jurisdiction in bankruptcy?* Such an allegation would give a court of equity jurisdiction, but the question is, could it give jurisdiction to a court in bankruptcy? Would an allegation, that a corporation had conveyed its property to one of its stockholders in preference to the claims of other stockholders, vest a court in bankruptcy with jurisdiction of the case?

But the instance that is conclusive upon this point is as follows:

With the exception of the first subdivision all of the acts of bankruptcy, specified by Congress, are only acts of bankruptcy when the bankrupt is insolvent, and solvency is a complete defense to the application for an involuntary adjudication.

The insolvency referred to in the Bankrupt Act,—as it appears to be defined,—is its condition where its assets taken at a fair value do not equal its liabilities. Could a stockholder make the allegation that the corporation was insolvent because its assets, taken at a fair value, would not equal the par value of its stock? What would or could the form of this allegation be? The insolvency of a corporation, so far as its stockholders are concerned, is *sui generis*, and there is no analogy between its insolvency and the insolvency referred to in the Bankrupt Act. This confusion is a part of the error involved in the assumption that a stockholder can be a creditor and simply illustrates that it was not within the purview of Congress that stockholders should be allowed to put a corporation into

bankruptcy, that the bankrupt court should wind up a corporation for the benefit of its stockholders, or that the operation of the Bankrupt Act should be extended to those instances of corporate management which have always fallen within the province of the court of equity.

4. It is very plain that the Bankrupt Act was never intended to include the distribution of the assets of a corporation among its shareholders. This follows inevitably from the history of the act and from the language of Section 8, Art. I, of the Constitution, where Congress was given power to pass "uniform laws on the subject of bankruptcies." Bankruptcies were originally applied to traders only and it was at one time questioned in this country whether Congress could constitutionally extend the act to apply to others. This, however, is no longer an open question and it is now established law that Congress may enforce a uniform law on the subject of bankruptcies and so broaden the operation of that law as to include all classes of debtors and all classes of creditors. But it is equally clear that this broadening extension has never gone so far as to include the winding up of corporations in the interests of their shareholders and it would require some affirmative and specific legislation upon this point to confer jurisdiction upon the bankrupt court along such lines, assuming that such legislation were constitutional. That it has not done so is quite clear from the Bankrupt Act and that it has not done so in this instance is equally clear from the



opinion of the State Supreme Court on one branch of the litigation, heretofore had over this case. For the State Supreme Court has held, with respect to the present bankrupt, that the jurisdiction of the bankrupt court only extended to the instances clearly specified in the Bankrupt Act, and did not supersede a state legislation providing for the dissolution and winding up of the corporation upon other grounds. A portion of the Bankrupt Act, under the very line of reasoning ably set forth in the opinion of Mr. Justice Henshaw, could not apply to a controversy between the corporation and its stockholders.

See *Cont. B. & L. Ass'n v. Superior Court*,  
— Cal —.

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### III.

THE FACT THAT THE ASSETS TO BE ADMINISTERED UPON IN THE BANKRUPT COURT GREATLY EXCEED THE VALUE OF THE PROVABLE CLAIMS AGAINST THE BANKRUPT, DOES NOT DEPRIVE THE ONLY CREDITORS WHO HAVE PROVABLE CLAIMS FROM ELECTING A TRUSTEE FOR THE BANKRUPT, AND ADMINISTERING UPON HIS ESTATE UNTIL THEY ARE PAID.

The proposition of law contained in the foregoing point is self-evident, but in view of the opinion of the District Court, a word or two upon its subject matter is proper.

The court below, after admitting the grave character of the question whether shareholders could be creditors, states that under the peculiar circumstance of this case "that question" need not be definitely determined at this time and continues:

“The adjudication was had upon the petition of the corporation itself. The shareholders were named in the petition as creditors. If they are not creditors within the meaning of the bankrupt law, the corporation is not insolvent. \* \* \* No one interested has made any objection to the adjudication and so long as it stands, based on the theory that the shareholders are creditors, they must be regarded as creditors for all purposes.”

It will thus be observed that the judge of the lower court concluded inferentially, if not directly, that because the petition asserted that certain persons were creditors, the lawful creditors of the bankrupt were estopped to deny that fact. This conclusion is erroneous for several reasons.

1. In the first place, it is based primarily upon the suggestion of the court below that no person except one who is insolvent can obtain the benefit of the bankrupt act. Such is not the law. Any person, whether solvent or insolvent, may become a bankrupt voluntarily.

2. In the second place no person by alleging that certain other persons are creditors, can make them creditors as against the opposition of the real creditors. The bankrupt act provides a careful machinery for all disputes not alone between creditors of the bankrupt, but between parties who claim to be creditors of the bankrupt as between themselves.

The theory of the court below was, that as the bankrupt chose to assume in its petition that its stockholders were creditors, that not alone was it estopped to deny that fact, but that in addition

other creditors could not do so. It is evident that such a position is untenable.

3. The question of whether or not a particular person is a creditor of the bankrupt is not a question of fact but one of law. The most solemn admission of the bankrupt could not make one a creditor, who is not a creditor. Moreover, the admission here is not an admission of fact,—it is merely an allegation that certain persons occupy a certain status toward the corporation, from which the corporation admits or concludes that they are creditors. This is not the admission of a fact but a conclusion of law, in no wise binding upon anybody. For example, the petition here admits simply that certain persons are stockholders of the corporation. From this admission the petitioner concludes that these persons are creditors in a particular amount. Such an admission is valueless from any standpoint.



#### IV.

THE DECISIONS OF THE COURTS ARE UNIFORMLY TO THE EFFECT THAT STOCKHOLDERS IN A BUILDING AND LOAN ASSOCIATION ARE NOT CREDITORS.

So far we have discussed the question involved in this case upon principle. We might well have contented ourselves by quoting from the decisions of the courts, including this court, in which, as we think, this question has been definitely decided. The insolvency of a building and loan association is *sui generis* and the only occasion when this question has



been discussed by courts at all has been in proceedings in equity in which the corporations have sought to be wound up in the interests of the stockholders.

In *Towle v. American Building & Loan Investment Co.*, 61 Fed. 448, the character of a building and loan association was fully discussed. That case was a proceeding in equity to wind up a building and loan association and Judge Grosscup said:

“These associations are essentially corporate copartnerships. They have no function except to gather together, from small, stated contributions, sums large enough to justify loans. Their officers are the agents of every stockholder. They have no debtors or creditors except the stockholders, and whether a stockholder is creditor or debtor depends on whether he has exercised his privilege of borrowing money from the common fund. The insolvency of such an institution is *sui generis*. There can be, strictly speaking, no insolvency, for the only creditors are the stockholders by virtue of their stock. The so-called insolvency is such a condition of the affairs of the association as reduces the available and collectible funds below the level of the amount of stock already paid in. The association is said to be insolvent when it cannot pay back to its stockholders the amount of their actual contribution, dollar for dollar. The association does not deal as a corporate entity with its borrowers as strangers. The by-laws determine who become borrowers, and the officers, who are agents of such borrowers, as well as of the remaining stockholders, in the transaction, simply execute these by-laws. None of the liabilities or maxims, therefore, which apply to contracts between strangers are applicable to these transactions. The transac-

tion of borrowing is not between strangers, or the result of contract or dealing, but is simply the execution of pre-existing rights among the stockholders. I think it plain that, when the condition of the association shows that, instead of making profits, it loses the principal of the contributing stockholders, there is power in a court of equity to wind up its affairs upon purely equitable principles. This will consist in calling in the loans, and paying out the funds thus received to the stockholders. It is not seriously disputed that on such an adjustment the borrower is under obligation to repay the actual sum received, together with interest thereon."

The same case was held in 60 Fed. 131, and at page 133 it was said:

"The complainant is, substantially, both depositor and shareholder. Under the constitution of the society, each member passed into the treasury, periodically, certain stipulated sums. The fund thus collected is loaned out upon real estate security. The interest of the member is not that simply of a depositor in a bank, or a creditor of a corporation. He holds no promise of the corporation for a return of his fund. He is a part owner of the fund,—has an interest directly in the fund,—and is entitled to a proportionate share, as owner, upon its distribution. The whole scheme of building association is that of a corporate copartnership, whereby are gathered into a common fund, and loaned as such, the money of many individuals. The interest of each shareholder in the sums thus collected and loaned is as direct as if no corporation intervened. The corporation has no function or power, except to loan out these gathered sums, and return the avails thereof into the hands of the contributors."

This case is regarded as a leading authority by the text books and has been repeatedly affirmed by subsequent decisions of the federal courts.

See:

*Thompson, B. & L. Assn.*, pp. sec. ed. 220, 337, 339, 343, 344, 606, 607, 608;

*Manship v. New So. B. & L. Assn.*, 110 Fed. 845-862;

*Sullivan v. S.*—?, 86 Fed. 491, 493; ....

*MacMurray v. Gosner*, 106 Fed. 11, 12;

*Coltrane v. Balt. B. & L. Assn.*, 110 Fed. 293-96, 306, 307, 309;

*Pac. L. T. & B. v. Green*, (C. C. A.) 173 Fed. 43, 46 (9th Circuit);

*Girvin v. I. B. B. & L. Assn.*, 132 Fed. 710;

*Gunby v. Armstrong*, 133 Fed. 417, 427;

*Cooper v. Newton*, 166 Fed. 190, 196.

“A building and loan association ordinarily does not have outside creditors as do general corporations, and unless there is a deficiency of assets there is no insolvency, in the proper sense of the word, but merely a loss of corporate capital, and consequently depreciation in value of the stock held by the member.”

*Thompson, B. & L. Assns.*, §120, citing:

*Towle v. Am., etc., Soc.*, 61 Fed. 446;

*Knutson v. N. W., etc., Assn.*, 67 Minn. 201, 69 N. W. 889.

The Towle case is cited with approval, in at least one particular, by this court, in *Pacific L. T. & B. Assn. v. Green*, 123 Fed. 43, 46.



It is very plain that this language can not be reconciled with the theory contended for in the court below that these shareholders are creditors, and it is not necessary to pursue this subject further, as we shall now proceed to show that there is a direct authority controlling, as we think, upon this court on the point that shareholders of a building and loan association are not creditors.

In *Coltrane v. Blake*, 113 Fed. 785, the question was discussed as to whether the holders of paid-up stock in a building and loan association were creditors of the association, and it was held that they were not. In that case the court said:

“Holders of paid-up stock; are they creditors of the association? In his very able report the special master discusses and exhausts this question. He holds that they remain stockholders and are not entitled to stand as creditors. ‘There is nothing in any of the by-laws of the corporation which as much as suggests that the holders of paid-up stock are anything other than stockholders. They were allowed a vote at a stockholders’ meetings, and many of them, including the petitioners in intervening in this cause, did vote at least by proxy. They were eligible to office, and were so elected. It is true that they received a definite dividend on their stock, and would not have been entitled to any more, no matter how great the profits of the corporation might have turned out to be. But such a contract is not uncommon between corporations and holders of certain classes of stock.’ And then he quotes 1 Cook, Stock, Stockh. & Corp. Laws, Sec. 269; *Hamlin v. Railroad Co.*, 24 C. C. A. 271, 78 Fed. 664, 36 L. R. A. 826; *Mercantile Trust Co. v. Baltimore & O. R. Co.*, (C. C.) 82 Fed. 365. These cases sustain him.

The case last quoted was decided by the circuit court of the United States for the District of Maryland. In that case the Circuit Court (a full bench) says: 'There is a legal inference that the claim of a stockholder, with a voice in the management of the corporation, is subordinate to debts due to creditors. That this inference is a well-recognized rule of law, and that to rebut it the expression of a contrary intent, in clear and unambiguous language, is required, is shown by the following citations.' Then follows a long list of authorities. If this be the status of this paid-up stock, the holder of it comes within the rule which governs other stockholders. They cannot share the assets until all debts are paid. *Plimpton v. Bigelow*, 93 N. Y. 592; *Fisher v. President, etc.*, 5 Gray 373; *Gibbons v. Mahon*, 136 U. S. 557, 10 Sup. Ct. 1057, 34 L. Ed. 525. And so they are neither more nor less than stockholders. The Maryland courts adopt this view also. Tax cases, 50 Md. 321. We concur with the court below in overruling the exception to the report on this point, and in adopting the conclusion of the special master.

"Are stockholders who have given notice of withdrawal creditors? The special master finds as a fact that under the by-laws of the association as amended, it is expressly declared that a withdrawal notice does not constitute a withdrawal or terminate the membership, or give to the person filing such notice the status of a creditor, or create any rights of action, legal or equitable, against the association, or in any manner alter or disturb the rights or duties as a member. This ends the case so far as those are concerned who acquired their stock after May, 1899, the date of the amendment.

"The master also finds as a fact that under the by-laws of 1891, 30 days notice was required before the stock could be withdrawn or reduced. In fact no notice of a desire to withdraw was



given, in this case, 30 days before the appointment of a receiver in any claim proved in this case. The master discusses the question at some length, and reviews the authorities. He shows that there is a conflict of authorities upon the question whether a stockholder who has exercised his right to withdraw, and has given the notice required, and such notice has matured, can rank as a creditor. But all authorities agree that he cannot be recognized as a creditor if such notice has not matured. And this is based on reason. The condition precedent to a right to withdraw is notice for 30 days."

In this case, also, the principle involved in the question is discussed, and the court said:

"There is another point of view. A stockholder in a corporation, by reason of his ownership of shares, has the right to participate according to the amount of his stock in the surplus profits of the corporation on a division, and ultimately, on its dissolution, in the assets remaining after payment of its debts. *Plimpton v. Bigelow*, 93 N. Y. 592; *Gibbons v. Mahon*, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. Ed. 525; *Fisher v. President, etc.*, 5 Gray 373. So, upon the dissolution of the corporation after the debts are paid, the stockholders rank as creditors, and have a legal claim on so much of the capital stock as remains. The rule in the United States is that the capital stock of a corporation is impressed with a trust for the payment of the creditors of the corporation. *Wood v. Dummer*, 3 Mason, 308, Fed. Cas. No. 17,944; *Sawyer v. Hoag*, 17 Wall. 610, 21 L. Ed. 731. Especially is this the case with insolvent corporations. The capital stock of a building and loan association is composed of the subscriptions to it, either by cash or by dues. If



any part of these dues is diverted from the claims of creditors generally, and is used for the benefit of a single stockholder by way of credit on a debt due by him to the corporation, it is a misuse of trust funds, and so unlawful.”

Here we have the principle announced upon which stockholders are entitled to share in the assets of an insolvent corporation. This principle is the principle which governs the distribution of the assets of all corporation among its shareholders after its debts are paid. “Upon the dissolution of the corporation,” *after the debts are paid*, the stockholders “rank” as creditors and have a legal claim on so much of the capital stock as remains. The reason is as there stated, that in this country the capital stock of a corporation is a “trust fund” for the benefit of its creditors. Now, if the stockholders of a corporation are creditors, as is claimed in this case, *then the capital stock is a trust fund for their benefit*. Yet it has been repeatedly held and is held in that case, specifically, so far as dues are concerned, that the diversion of any part of the capital stock to the benefit of a stockholder, is a breach of its trust relation toward its creditors. But, if such stockholders are, as is claimed, creditors, such a diversion, instead of being in violation of law, would be in full accord with the trust fund theory. If anything were needed to show that the stockholders of a building and loan association are not creditors, and have not provable claims, it is the opinion of the court of appeals in this *Coltrane* case.

In *Lewis v. Clark*, 129 Fed. 570, Judge Hawley, on appeal, speaking for this court, said:

“The shareholders in associations of this character are not in the ordinary sense creditors and if deemed creditors in any sense they are necessarily subject to all equities existing between themselves.”

The language of the Federal Supreme Court may be repeated:

A person “cannot be both creditor and debtor by virtue of his ownership of stock.”

*Warren v. King*, 108 U. S. 38, 399.

No citations of further authority can be necessary. It seems to us, therefore, very clear from the foregoing that the ruling of the court below that shareholders of the corporation were creditors and as such were entitled to vote within the meaning of the Bankrupt Act, was erroneous.

Its conclusion that the Merchants National Bank was not a creditor within the meaning of the Bankrupt Act is, we think, unquestionably erroneous.

In this connection a word should be said upon the intimation made in a court below that the Merchants National Bank was a preferred creditor. Of course, the creditors of the corporation are preferred in payment to the shareholders who are distributees. *Colthane v. Blake*, *supra*. The authorities we have already cited on this point are conclusive. Now, the fact that a creditor of a corporation will be paid in full, and that a balance exists which will be divided in a court of equity among

the shareholders does not cause the creditor to lose his status of creditor. Yet such is the legal effect of the claim now made.

The logical result of this ruling is this: That in an instance in which the assets of the corporation are sufficient to pay the debts of the corporation in full, the stockholders alone are creditors of the bankrupt corporation and entitled to vote for trustee, while in the event that the assets of the corporation are not sufficient to pay its debts, then only the general creditors are creditors within the meaning of the Bankrupt Act who are entitled to vote. No such distinction as this can be found in the Bankrupt Act, and the error in this particular flows in part from the erroneous supposition indulged that a person can not avail himself of the Bankrupt Act unless he is actually insolvent.

It follows, therefore, that the order appealed from should be reversed, and it is accordingly so submitted.

Dated, San Francisco,  
March 11, 1916.

R. P. HENSHALL,  
*Attorney for Appellants  
and Petitioner.*



No. 2684

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

MERCHANTS NATIONAL BANK OF SAN FRANCISCO (a corporation),

*Petitioner,*

vs.

THE CONTINENTAL BUILDING AND LOAN ASSOCIATION (a corporation) et al.,

*Respondents,*

In the Matter of Continental Building and Loan Association, Bankrupt.

## BRIEF FOR RESPONDENTS.

HELLER, POWERS & EHRLMAN,  
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*Attorneys for Respondents.*

Filed this.....day of March, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.



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## BRIEF FOR RESPONDENTS.

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### Statement of the Case.

(Italics are ours except where otherwise noted.)

While the statement of the case set forth in petitioner's brief is in the main correct, some matters have been omitted and others require correction. In speaking of "petitioner" throughout this brief we refer, of course, to the Merchants National Bank of San Francisco.

In its petition to revise addressed to this court, petitioner admits that the Continental Building



and Loan Association was *duly* adjudged a bankrupt on August 9, 1915 (Trans. p. 1). "Duly adjudged" means that the association presented to the District Judge a voluntary petition in bankruptcy in conformity with Official Form No. 2 prescribed by the Supreme Court of the United States in its General Order No. XXXVIII promulgated in accordance with the power conferred upon the court by Section 30 of the Bankruptcy Act. The petition in bankruptcy in the case at bar, therefore, following this official form, sets forth that "The corporation owes debts which it is unable to pay in full". This petition was accompanied, in the form of exhibits, by the schedules of liabilities and assets required by the said official form. The only persons listed in these schedules as creditors to whom the corporation owes debts are its shareholders (Trans. p. 60). The Merchants National Bank of San Francisco and the other creditors of its class, viz: Pacific Gas & Electric Co. and Grant Co., were not mentioned in these schedules. The referee in bankruptcy explains this omission by saying: "These claims are not scheduled by the bankrupt, being, as I am informed, inadvertently omitted" (Trans. p. 31).

The total indebtedness to shareholders listed in these schedules is \$751,508.13 (Trans. p. 33). The total indebtedness due creditors of the class of petitioner is but \$12,198.90, and of this sum there is due but \$2611.20 to petitioner (Trans. p. 31).

Petitioner is in error in saying that at the first meeting of creditors held before the referee in

bankruptcy on September 15, 1915, "the only other creditor of the bankrupt present was the Pacific Gas & Electric Co.," for, in its petition to this court, petitioner states that Grant Co. was also present, and there was also present, at the meeting, as creditors, either in person or by proxy, over seven hundred shareholders with claims exceeding \$500,000 (Trans. p. 60).

At this meeting the referee in bankruptcy did not refuse petitioner the right to vote for trustee until after petitioner had claimed priority of payment of its entire claim and had refused to waive such priority (Trans. p. 31).

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### **Brief of the Argument.**

**I. Whether the shareholders of the bankrupt are creditors with provable claims or not, petitioner cannot vote for trustee because it claims priority of payment.**

Bankruptcy Act, Sections 56b and 57e.

**II. The bankruptcy of a building and loan association makes the shareholders creditors but gives "outside creditors", such as petitioner, the right to priority of payment.**

**(a) Upon the adjudication petitioner became a "Priority Creditor".**

Bankruptcy Act, Chap. VI; Section 56b; Section 57e; Section 57g; Sections 60a-b.

**(b) The adjudication was made upon theory that shareholders were creditors.**

In re Gerber, 186 Fed. Rep. 693, 696; 26 Am. B. R. 608, 613.

**(c) Petitioner cannot upset the theory of the adjudication except by a direct attack on the adjudication.**

Collier on Bankruptcy, 10th Ed. p. 122;  
 Loveland on Bankruptcy, 4th Ed. pp. 346,  
 347;

Hanover National Bank v. Moyses, 186 U. S.  
 181, 190; 8 Am. B. R., 1, 10;

In re Fowler, No. 4998 Fed. Cas., 1 Low 161.

**(d) Petitioner has assumed an inconsistent position.**

**(e) It is legally possible for the shareholders of a building and loan association to become creditors upon bankruptcy.**

Coltrane v. Blake, 113 Fed. Rep. 785, 792;  
 Alexander v. Southern Home Building &  
 Loan Association, 110 Fed. Rep. 267, 268.

**(f) That shareholders become creditors upon bankruptcy is the effect of the decisions.**

**III. Shareholders of building and loan associations, having become creditors thereof in bankruptcy, have provable, and not contingent, claims.**

Car v. Hamilton, 129 U. S. 252, 256; 9 Sup.  
 Ct. 295, 32 L. Ed. 669;

Lovell v. St. Louis Life Ins. Co., 111 U. S.  
 264; 28 L. Ed. 423;

In re Mahler, 155 Fed. Rep. 428; 5 Am. B. R.  
 453, 457;

Watson v. Merrill, 136 Fed. Rep. 359; 14 Am.  
 B. R. 453.



IV. Bankruptcy courts proceed upon equitable principles, and it would be inequitable to permit petitioner to control the election of a trustee.

In re Gerber, 186 Fed. Rep. 693, 696; 26 Am. B. R. 608, 613.

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### Argument.

#### I.

**WHETHER THE SHAREHOLDERS OF THE BANKRUPT ARE CREDITORS WITH PROVABLE CLAIMS OR NOT, PETITIONER CANNOT VOTE FOR TRUSTEE BECAUSE IT CLAIMS PRIORITY OF PAYMENT.**

There is no escape from this proposition. Petitioner avoids this subject in its brief until the very end and then dismisses it with but a paragraph. It is really the vital point on this appeal and all of the other discussions contained in petitioner's brief are beside the point.

Creditors claiming priority of payment, like petitioner here, cannot vote for trustee (Section 56b of the Bankruptcy Act). This provision is statutory and must be obeyed. There is no exception. For this reason alone, if for no other, the order of the District Judge should be affirmed.

Petitioner has not in any wise been prejudiced by being denied the right to vote for trustee. When petitioner appeared at the first meeting of creditors and attempted to control the election of a trustee the referee required petitioner to elect

whether or not it claimed priority, and upon being informed that it did claim such priority and refused to waive the same, denied it the right to vote. This was in strict compliance with Sections 56b and 57e of the Bankruptcy Act.

On account of the priority nature of its claim petitioner is not interested in the election of a trustee. The theory of the Bankruptcy Act is to exclude from participation in the choice of a trustee those creditors who are sure of payment before all others and to put the selection in the hands of those who must take a chance on the outcome after such priority creditors are paid. Bankruptcy ordinarily means that all creditors will not be paid in full. Priority creditors will be paid in full, or at least will be paid before all others. Unsecured creditors, like the shareholders in this proceeding, will not be paid in full, and the amount that they recover depends entirely upon the nature of the assets and the skill with which these assets are liquidated. The interest of the shareholders, therefore, is purely speculative. The losses, if any, must fall upon them. For this reason Congress has wisely provided in the Bankruptcy Act that unsecured creditors like the shareholders, and not priority creditors like the Merchants National Bank of San Francisco, shall be the ones who have a right to pick the trustee upon whom so much depends for substantial returns upon their claims.

## II.

THE BANKRUPTCY OF A BUILDING AND LOAN ASSOCIATION  
MAKES THE SHAREHOLDERS CREDITORS BUT GIVES  
“OUTSIDE CREDITORS”, SUCH AS PETITIONER, THE RIGHT  
TO PRIORITY OF PAYMENT.

(a) Upon the Adjudication Petitioner Became a “Priority  
Creditor.”

There are but four classes of creditors recognized by the Bankruptcy Act: Secured, priority, preferred and unsecured (Bankruptcy Act, Chap. VI). Secured and priority creditors cannot vote for trustee, where their debts are fully secured, or priority is claimed for the *full* amount (see Section 56b of the Bankruptcy Act). Preferred creditors, or those that have received preferential payments voidable by the trustee under Section 60a-b of the Bankruptcy Act, cannot vote until they have surrendered such preferences to the trustee (Bankruptcy Act, Section 57g). The only creditors that can vote for trustee, then, are those of the unsecured class, for where secured creditors are not fully secured, and priority creditors do not claim full priority, their claims are unsecured to that extent, likewise preferred creditors who surrender their preferences.

There is no dispute over the proposition that upon the bankruptcy of a building and loan association “outside creditors”, without security or preferences, such as petitioner here, are entitled to be paid in full prior to any payments to the shareholder creditors. The authorities supporting this proposition are unanimous and the rule requires



no citation. Petitioner takes this position in this proceeding and is not opposed. This being so, the effect of the bankruptcy of a building and loan association "duly adjudicated", as in this case, is to relegate such "outside creditors" to the priority class, without power to vote for trustee, and the shareholders to the unsecured class with the exclusive power to vote for trustee.

**(b) The Adjudication Was Made Upon Theory That Shareholders Were Creditors.**

Petitioner would have us believe that the only purpose of the bankruptcy proceeding was to pay off these "outside creditors". The assets of a bankrupt corporation can be used only in payment of expenses of administration and dividends to creditors. Should there be a surplus this must be returned to the bankrupt. In the case at bar therefore, if petitioner's position be sound, only enough of the \$750,000 assets can be administered upon to pay off the "outside creditors" \$12,198.90, and the balance of these vast assets must be then turned back to the corporation. Petitioner's trustee could not dispose of this balance in any other way; he could not distribute among the shareholders, because, as petitioner asserts, the shareholders are not creditors.

That petitioner's position leads to an absurdity it quite apparent from the foregoing. It cannot be said that the bankrupt intended to walk right into the bankruptcy court, pay off \$12,000 of liabilities with \$750,000 of assets, turn right around and walk

right out again. The bankrupt sought the aid of the bankruptcy court to liquidate its entire affairs upon equitable principles (in *re Gerber*, 186 Fed. Rep. 693, 696; 26 Am. B. R. 608, 613), treating all with claims against the bankrupt as creditors, but giving the so-called "outside creditors" a priority. As Judge Dooling well said in his opinion (Trans. p. 60):

"The question as to whether the shareholders can be at the same time creditors, is an interesting one, but under the peculiar circumstances of this case need not be definitely determined at this time. The adjudication was had upon the petition of the corporation itself. The shareholders were named in the petition as creditors. If they are not creditors within the meaning of the Bankrupt law the corporation is not insolvent as the only other claims amount to about \$12,198.90, while the assets of the corporation are scheduled at \$769,508.13. If, therefore, the shareholders are eliminated as creditors we have these vast assets with which to pay debts of \$12,198.90. No one interested has made any objection to the adjudication, and so long as it stands based on the theory that the shareholders are creditors, they must be regarded as creditors for all purposes. The Merchants National Bank will be paid in full whatever happens to the shareholders' claims."

The adjudication was, and must have been, made upon the theory that the shareholders were creditors, as set forth in the schedules, otherwise the corporation would not have been subject to adjudication because it would not have been "unable to pay its debts in full", and would have been with-

out creditors, the “outside creditors” not having been mentioned. Petitioner admits the adjudication was “duly made” (Trans. p. 1), and is bound by the implied determination in such adjudication, which determination was necessary to its validity, that the shareholders are creditors. If petitioner has any grievance it is that the adjudication should never have been made at all. Having suffered to remain unchallenged all this time an adjudication based upon the theory that the shareholders are creditors within the meaning of the Bankruptcy Act, petitioner is now estopped to deny that the shareholders are such creditors.

**(c) Petitioner Cannot Upset the Theory of the Adjudication  
Except by a Direct Attack on the Adjudication.**

Before a corporation can file a voluntary petition in bankruptcy it must have certain qualifications. *First*, it must owe debts to creditors who have provable claims in bankruptcy. In the case at bar the petition and schedules filed by the Continental Building and Loan Association shows that it owes debts to a very large number of shareholder creditors, but to no other creditors, and that these shareholder creditors have provable claims against the corporation in bankruptcy.

Collier on Bankruptcy, 10th Ed. p. 122;  
Loveland on Bankruptcy, 4th Ed. pp. 346,  
347.

*Second.* It must appear that the corporation is unable to pay these debts in full. An allegation to



this effect was made in the petition in the case at bar and was accepted as true by the District Judge when he made the adjudication. While the amendment of 1910 to Section 4 of the Bankruptcy Act has omitted the clause "owing debts", there seems no good reason for the elimination of these words, and it is probable that the change was inadvertent and should be considered as an error. It does not materially affect the operation of the act, for it is obvious that there can be no bankruptcy without the existence of debts. It must still be held that a corporation must owe a debt or debts in order to become qualified to become a voluntary bankrupt.

Collier on Bankruptcy, 10th Ed. page 122.

The Supreme Court of the United States in the case of *Hanover National Bank v. Moyses*, 186 U. S. 181, 8 Am. B. R. 1, 10, said at page 190 of 186 U. S., and 10 of 8 Am. B. Rep.:

"The act provides that 'any person who owes debts, except a corporation shall be entitled to the benefits of this act as a voluntary bankrupt' (Sec. 4a), and that 'upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition' (Sec. 18g). With the petition he must file schedules of his property, and 'of his creditors, showing their residences, if known, if unknown, that fact to be stated' (Sec. 7, subd. 8). The schedules must be verified, and the petition must state that 'petitioner owes debts which he is unable to pay in full', and 'that he is willing to surrender all his property for the benefit of his creditors, except such as is exempt by law'. This estab-

lishes those facts so far as a decree of bankruptcy is concerned.”

The order of adjudication in the case at bar, therefore, unless set aside or reversed by an appellate court, is conclusive upon the point that the corporation owes to its shareholders as creditors debts founded upon claims provable in bankruptcy (In re Fowler, No. 4998 Fed. Cas., 1 Low 161), and petitioner is estopped and precluded to deny the effect of the adjudication in this respect except by some direct proceeding either in a petition to set aside the adjudication or on an appeal from the adjudication.

**(d) Petitioner Has Assumed an Inconsistent Position.**

Not only this but the very position which petitioner now assumes is inconsistent with any other theory than that the shareholders are creditors. This appears if we consider, for a moment, that this proceeding revolves around the election of a trustee, petitioner claiming that it is the only creditor capable of voting upon such a matter. But, clearly, petitioner can have no standing to make any claim whatsoever in reference to such election unless there has been a valid adjudication that the Continental Building and Loan Association is a bankrupt, for if it were not so adjudicated there would be no necessity of electing a trustee, and in fact no authority to do so. Petitioner's position, therefore, is founded upon the fact that there is a valid adjudication, and if there has been a valid adjudication it could only have been made upon the theory that the shareholders are creditors, be-

cause they were the only persons mentioned in the schedules as such. If they are not creditors, the bankrupt has more than sufficient assets to pay its debts—does not owe debts it cannot pay in full. So that petitioner cannot on the one hand take a position that must concede that the shareholders were creditors for the purpose of obtaining an adjudication of the association's bankruptcy, and on the other hand (and when such adjudication is accomplished) face about and claim that these same shareholders are not creditors. To sum up, if the shareholders are not creditors there could be no proceeding in bankruptcy and petitioner would not now be seeking relief against the action of the District Court and the referee.

**(e) It Is Legally Possible for the Shareholders of a Building and Loan Association to Become Creditors Upon Bankruptcy.**

The first point made by petitioner in its brief is that

“a shareholder of a corporation is a distributee of its assets after all claims against the corporation are paid, and it is legally impossible for such a shareholder, pursuant to the transaction by virtue of which he becomes a shareholder, to be a creditor of the corporation within the meaning of the Bankruptcy Act” (Petitioner's Brief, p. 7).

Petitioner goes on to say in its brief: “The proposition of law contained in the foregoing is self-evident and we suppose will not be disputed”. It is disputed, however, and is not self-evident, or evident at all.



It is true that the situation presented in the case at bar is peculiar and unusual. That does not mean, however, that we must allow ourselves to become tangled up in a maze of technicalities and to be led astray from a plain, common-sense solution of the situation that will enable the court to do substantial justice to all and permit the bankruptcy to proceed along the lines initiated. We must bear in mind that there is a big difference between the shareholder of a building and loan association, whose capital stock consists of the dues paid in by their members together with the apportioned profits, and a stockholder of an ordinary commercial corporation. The difference lies in the absolute right of every shareholder to withdraw at any time from the association and receive what he has paid in plus his share of the profits earned and minus the penalties imposed for withdrawal, without being compelled to complete his stock subscription. This difference is well explained by the referee in bankruptcy (Trans. pp. 36 and 37):

“But there is another principle of these associations to be considered, and out of which a condition of insolvency may arise, peculiar to such associations, and that is the right given by law to every member to withdraw from the association and receive such an amount of what he has paid in, and profits earned, less penalties for withdrawal, provided by law. The right of withdrawal is absolute. While by virtue of his membership he is liable for the debts of the corporation to outside creditors in the proportion represented by his stock, as between the association and himself, the association cannot compel him to complete his stock subscription. There is, therefore, an absolute

obligation on the part of the association to pay all members such withdrawal value, and this establishes a condition of debtor and creditor.

To the extent of the obligation of the corporation to pay the withdrawal value of the stock based upon profits actually existing the identity of the corporation is distinguished from that of its members. If the corporation is solvent they can in law or in equity recover such withdrawal value. If the corporation is unable to pay back the principal paid in a state of insolvency exists. In the opinion of the referee the stockholders have provable claims in bankruptcy to this extent, and are entitled to their proportionate share of the profits, if any."

When a building and loan association goes through bankruptcy, it is this capital, or what is left of it, that is divided among the shareholders. Even in the case of ordinary commercial corporations, the courts hold that stockholders are creditors when it comes to a division of the capital upon insolvency, subject to the prior payment of claims of "outside creditors" (*Coltrane v. Blake*, 113 Fed. Rep. 785, 792). In the case of *Alexander v. Southern Home Building & Loan Association*, 110 Fed. Rep. 267, the court, at page 268, said:

"When the bill in this case was filed the association was not insolvent, in the proper sense of the term. There were no debts to outside creditors of any importance. The mass of the obligations of the association were due and to become due to its members, who occupied the position of stockholders, with the right to become eventual creditors. The association is in the hands of the court for settlement and winding up because, for the many

reasons stated in the bill, it is impossible to carry out the objects and purposes of the association. The practical effect of the appointment of the receiver for the purpose of winding it up is to turn or transform all the stockholders into creditors, and thus make the association insolvent; and the course to pursue under the bill is to collect the assets and distribute them as justice and equity require.”

**(f) That Shareholders Become Creditors Upon Bankruptcy Is the Effect of the Decisions.**

Petitioner cites a large number of cases in its brief (Petitioner’s Brief, p. 23) in attempting to establish its fifth point that the decisions of the courts are uniform to the effect that shareholders in a building and loan association are not creditors. An examination of these authorities reveals that they all agree upon the proposition that upon bankruptcy shareholders are creditors after the outside debts are paid. What difference is there, in substance, between such a statement, and respondents’ position that both shareholders and outsiders are creditors upon bankruptcy, with the outside creditors entitled to priority of payment over the shareholder creditors? It is a familiar maxim of jurisprudence that courts respect form less than substance (Civil Code Cal., Sec. 3528).

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### III.

**SHAREHOLDERS OF BUILDING AND LOAN ASSOCIATIONS, HAVING BECOME CREDITORS THEREOF IN BANKRUPTCY, HAVE PROVABLE, AND NOT CONTINGENT, CLAIMS.**

The next point made by petitioner in its brief is that



“No person can vote for the office of trustee unless he has a provable claim against the bankrupt, and shareholders of a corporation do not possess, by virtue of their shareholding, provable claims against the bankrupt within the meaning of the Bankrupt Act” (Petitioner’s Brief, p. 9).

Petitioner then engages in a long discussion attempting to show that the nature of the claims of shareholders is contingent and not that of a fixed liability absolutely owing at the time of the filing of the petition in bankruptcy. This proposition is well answered by the referee in bankruptcy in the quotation we have cited above (page 14 of this brief and Trans. pp. 36, 37).

Petitioner further states in its brief (Petitioner’s Brief, p. 12): “It is clear that the liability of the corporation to its stockholders is wholly of a contingent character. The amount of that liability is not capable of definite ascertainment”, but petitioner fails to show how this liability is contingent, or why it is not capable of definite ascertainment.

The liability of the corporation to the shareholders is not dependent upon contingencies that may or may not happen in the future. When it ceased its business by bankruptcy the Continental Building and Loan Association turned over its property to the bankruptcy court and became liable to its shareholders for the amounts paid in by them as dues, plus their apportioned share of the profits, if any. This is the most that the corporation could be liable for in any event, past, present or future. The amount paid in as dues by the shareholders is fixed and capable of ascertainment from the books

of the corporation as of the date of the filing of the petition in bankruptcy. The amount of profits, if any, are likewise also capable of ascertainment. There will be no further dues paid in, and no further profits earned, after the filing of the petition in bankruptcy, for the reason that the corporation has ceased to do business, and so there is nothing in the future to figure on in determining the "fixed liability absolutely owing at the time of the filing of the petition".

As was said by Mr. Justice Bradley, referring to a life insurance company which had gone into liquidation, in *Car v. Hamilton*, 129 U. S. 252, 256, 9 Sup. Ct. 295; 32 L. Ed. 669:

"By that act the company becomes *civilliter mortuus*. Its business is brought to an absolute end, and the policy holders become creditors to an amount equal to the equitable value of their respective policies, and entitled to participate pro rata in its assets."

A parallel case, in principle, is found in *Lovell v. St. Louis Life Ins. Co.*, 111 U. S. 264, 28 L. Ed. 423, in which the court held that where an insurance company had terminated its business and transferred its assets and policies to another company whereby it totally abandoned the performance of its contracts by transferring all of its assets and obligations to the new company, it thereby authorized the insured to treat the contract as at an end and to sue to recover back the premiums already paid, although the time for the performance of the obligation, to wit: the death of the insured, had not arrived.

In the case at bar, upon the bankruptcy of the association the shareholders were authorized to treat their relations with the corporation as at an end and to file claims based upon the withdrawal value of their shares as fixed by the by-laws even though they had not yet exercised the right of withdrawal, and even though the time for the performance of the obligations incurred by the association, to wit: the full payment of dues or the withdrawal by the shareholder, had not arrived.

Petitioner cites in its brief a great many cases relating to contingent claims, most of which are cases where attempts have been made to establish claims in bankruptcy proceedings based upon rent yet to accrue under a lease (Petitioner's Brief, p. 11). It is well established that rent to accrue upon a lease after bankruptcy is not a provable claim against the estate. As was said in the case of *In re Mahler*, 155 Fed. Rep. 428, 5 Am. B. R. 453, 457:

“It is clear that the claim for future rent is not ‘a fixed liability \* \* \* absolutely owing at the time of the filing of the petition against him’ (the bankrupt) because before the day at which rent is covenanted to be paid it is in no sense a debt. It is neither debitum nor solvendum; for, if the lessee is evicted before that day, it never becomes payable. *Bordman v. Osborn*, 23 Pick. 295; *Savory v. Stocking*, 4 Cush. 607; *Deane v. Caldwell*, 127 Mass. 242; *Wilder v. Peabody*, 37 Minn. 249, 33 N. W. 852; *In re Commercial Bulletin Co.*, 2 Woods. 220, Fed. Cas. No. 3,060. It is said by Chief Justice Gray in the case of *Deane v. Caldwell*: ‘It is not an existing demand, the cause



of action for which depended upon a contingency, but the very existence of the demand depended upon a contingency.' A covenant to pay rent quarterly creates no debt until it becomes due, for before that time the lessee may quit, with the consent of the lessor; or he may assign his term with his consent; or he may be evicted by a title paramount to that of the lessor. In either of such cases he will be discharged from his covenant. *Wood v. Partridge*, 11 Mass. 488. It is not an unliquidated claim, capable of valuation, which may be proved and allowed after its amount has been ascertained. The general intent of Congress in the enactment of the statute was to make every debt and demand existing against the bankrupt at the time of his adjudication, which was recoverable either at law or in equity, provable in bankruptcy. This provision, however, is evidently intended to include and permit the proof of such claims then existing as are uncertain only in amount."

And also in the syllabus to the case of *Watson v. Merrill*, 136 Fed. Rep. 359, 14 Am. B. R. 453:

"Rents which the bankrupt had agreed to pay at times subsequent to the filing of the petition in bankruptcy do not constitute a provable claim under the Bankruptcy Law of 1898, because they are not a fixed liability \* \* \* absolutely owing at the time of the filing of the petition against him, and because they do not constitute an existing demand, but both the existence and the amount of the possible future demand are contingent upon future events, such as default of lessee, re-entry of lessor, and assumption by trustee, so that they neither form the basis of an unliquidated nor of a liquidated provable claim."

The distinction between the provability of claim for rent to accrue after bankruptcy and the provability of the claims of the shareholders in the case at bar is obvious. Neither the existence nor the amount of the claims of the shareholders depend upon future events. As we pointed out above, they both become fixed and capable of ascertainment at the date of the filing of the petition. There is absolutely nothing that can happen in the future that will in any way affect the fixing of the amount of the liability as of the date of the filing of the petition, and petitioner has not attempted to suggest any such contingency, for there is none.

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#### IV.

#### **BANKRUPTCY COURTS PROCEED UPON EQUITABLE PRINCIPLES, AND IT WOULD BE INEQUITABLE TO PERMIT PETITIONER TO CONTROL THE ELECTION OF A TRUSTEE.**

It is well established that bankruptcy courts proceed upon equitable principles (see *In re Gerber*, 186 Fed. Rep. 693, 696; 26 Am. B. R. 608, 613). It does not require any extended argument on our part to show the injustice of permitting the Merchants National Bank of San Francisco to control the election of the trustee. The matter is well put by the referee in bankruptcy who says (Trans. p. 33):

“The Merchants National Bank is an outside creditor, having a claim for \$2,611.20. It takes the position that as the stockholders are liable for the debts of the corporation, its claim is entitled to priority, and must be paid in full. Its petition for review is based upon the proposition that the outside creditors alone are en-

titled to name the trustee; that stockholders of the bankrupt are disqualified. At the meeting of September 15th, 1915, counsel for the Merchants National Bank sought to vote this claim and to exclude all stockholders from participating in the election. In my opinion the taking of this petition to review emanates from the office of counsel for the bankrupt. It is represented by an attorney associated with the attorney for the bankrupt. In addition to said Merchants National Bank there are only two creditors who are not stockholders, and their claims amount to \$9,587.70.

Considering that the indebtedness to the stockholders as scheduled amounts to \$751,434.65, and that the assets which are scheduled at \$769,508.13, will, with the exception of the few outside creditors named, be distributed to the stockholders, I can have no patience with a creditor who is claiming the right to be paid in full and who attempts to take the administration of this estate upon a claim of \$2,611.20 out of the hands of creditors representing \$751,434.75 upon a technicality of the kind presented. In my opinion this is a further attempt upon the part of officers of the Continental Building & Loan Association to control the administration of this estate."

Having taken complete jurisdiction over the assets of the bankrupt by reason of the filing of the petition and the subsequent adjudication, the bankruptcy court will proceed to administer upon these assets in accordance with equitable principles, that is to say, will see that creditors like the Merchants National Bank of San Francisco are paid in full as "priority creditors", and the balance of the creditors, to wit, the shareholders, receive the remainder of the estate pro rata according to their respective



claims. In view of the fact that most of the assets consist of loans made by the bankrupt upon real estate security, the pro rata that the shareholders receive depends a great deal upon the skill with which the estate is managed, that is to say, upon the qualifications of the trustee selected. The interests of the Merchants National Bank of San Francisco are not at all at stake for there are ample assets to pay it in full many times over, but the interests of the shareholders are at stake because the assets are apparently not sufficient to pay them in full, and the amount of their recoveries depends largely upon the manner in which the estate is handled. Surely, under these circumstances, it would be inequitable to permit the Merchants National Bank of San Francisco to select a trustee as against the shareholders, when the interests of the Merchants National Bank of San Francisco are so insignificant as compared with the interests of the shareholders.

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#### CONCLUSION.

In conclusion, we respectfully submit that, for the foregoing reasons, the order under review should be affirmed.

Dated, San Francisco,

March 21, 1916.

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